No. 89-1690-CSY
Status: GRANTED

Title: California, Petitioner
v.
Charles Steven Acevedo

Docketed:
April 30, 1990

Court: Court of Appeal of California,
Fourth Appellate District

Counsel for petitioner: Foster,Robert M.

Counsel for respondent: Anderson,Fred W.

40 typed copies of pet. and sep. app. recd. 4/30.

Entry	Date	Note	Proceedings and Orders
1	Apr 30 1990	G	Petition for writ of certiorari filed.
2	Apr 30 1990		Appendix of petitioner filed.
3	May 7 1990	G	Application (A89-783) for a stay pending disposition of petition for writ of certiorari, submitted to Justice O'Connor.
4	May 9 1990		Response to application (A89-783) filed by Charles Acevedo.
5	May 10 1990		(A89-783) Response to opposition filed by petitioner.
6	May 14 1990		Application (A89-783) granted by Justice O'Connor. Execution and enforcement of the judgment of the Court of Appeal of California, Fourth Appellate District, No. G007480, entered December 12, 1989, is stayed pending disposition of the petition for writ of certiorari.
7	Jun 5 1990		DISTRIBUTED. June 21, 1990
8	Jun 26 1990	F	Response requested -- CJ.
9	Jul 30 1990		Order extending time to file response to petition until August 25, 1990.
10	Aug 24 1990		Brief of respondent Charles Steven Acevedo in opposition filed.
11	Aug 24 1990	G	Motion of respondent for leave to proceed in forma pauperis filed.
12	Aug 29 1990		REDISTRIBUTED. September 24, 1990
13	Oct 1 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
14	Oct 1 1990		Petition GRANTED. **********
15	Nov 8 1990		Joint appendix filed.
16	Nov 8 1990		Brief of petitioner California filed.
17	Nov 16 1990		Record filed.
		*	Certified copy of original record, box, received.
18	Nov 23 1990		SET FOR ARGUMENT TUESDAY, JANUARY 8, 1991. (1ST CASE)
19	Nov 27 1990		CIRCULATED.
20	Dec 10 1990		Brief of respondent Charles Steven Acevedo filed.
21	Dec 20 1990	X	Reply brief of petitioner California filed.
22	Jan 8 1991		ARGUED.

NO. 89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The issue presented in this petition is the exact question that this Court deadlocked on in *Oklahoma* v. *Castleberry*, 471 U.S. 146, (1985), namely, whether, under the Fourth Amendment principles set forth in *United States* v. *Ross*, 456 U.S. 798, (1982), when an officer has probable cause to believe that there is contraband in a specific container within a vehicle, is he required to obtain a search warrant for that container or may he search the container for contraband without a warrant?

2. Did this Court's decision in *United States* v. *Ross*, *supra*, overrule or limit *United States* v. *Chadwick*, 433 U.S. 1, (1977)?

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PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, issued on December 12, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District,

Division Three is reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix A (pages A-1 through A-21).

The first order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix B (pages A-23 through A-25).

The first order modifying the majority opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix C (pages A-27 through A-28).

The second order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 California Reporter 23 and appears as Appendix D (pages A-30 through A-31).

The order of the Supreme Court of California denying Petitioner's petition for review on direct appeal was entered in

the Official Minutes of that court and reported in the Official Advance Sheets of the California Supreme Court. The minute entry is reproduced in Appendix E at page A-33.

JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three which was entered on December 12, 1989. The California Supreme Court denied review in this case on March 15, 1990. The present petition for writ of certiorari is filed within the required 90 day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 15, 1990. (*Market Street Railroad*

Co. v. *Railroad Commission*, 324 U.S. 548, 550-552, (1944). Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In an information filed by the District Attorney of Orange County, California, on June 24, 1988, respondent and a co-defendant were charged with one count of possession of marijuana for sale

in violation of California Health and Safety Code section 11359. (CT 2.)[1/]

On this same date respondent was arraigned in the Orange County Superior Court and entered a plea of not guilty to the charges. (CT 1.) Respondent's motions to suppress evidence pursuant to California Penal Code sections 995 and 1538.5 were heard and denied on October 7, 1988. (CT 77.)

On October 12, 1988, as part of a plea bargain, the information was amended to add a second count of possession for sale in violation of California Health and Safety Code section 11357, subdivision (c). Respondent then entered a plea of guilty to both counts. (CT 78; RT 40-41.)

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1. "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the reporter's transcript of the trial court proceedings. Both documents were included as part of the official record before the California Court of Appeal and California Supreme Court.

On this same date, respondent was granted probation on certain terms and conditions including 30 days in custody and a $100 fine. (CT 79.)

Respondent's notice of appeal was filed on November 10, 1988. (CT 83.) In a published decision filed on December 12, 1989, the Court of Appeal, Fourth Appellate District, Division Three, reversed with directions the judgment of the Superior Court and held that the search of the paper bag was illegal. (App. A.) Modifications to the opinion that did not change the result were issued on December 20 and 29, 1989, and January 3, 1990. (Apps. B, C and D.) On March 15, 1990, the California Supreme Court denied petitioner's petition for direct review. (App. E.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the Orange County, California Superior Court, respondent moved to

suppress evidence on the ground that the paper bag found in the trunk of his car was improperly searched under the Fourth Amendment without a warrant. (CT 49-53.) The trial court denied the motion to suppress evidence. (CT 77.)

The California Court of Appeal, Fourth Appellate District, Division Three, concluded that the search of the paper bag without a search warrant violated the Fourth Amendment to the United States Constitution. (App. A, B, C, D.)

Petitioner filed a petition for review arguing that respondent's Fourth Amendment rights had not been violated because the search of the entire car, including the paper bag, was justified under *United States* v. *Ross*, *supra*, 456 U.S. 798. The California Supreme Court denied petitioner's request for review. Justice Pannelli dissented, believing that review should have been granted.

STATEMENT OF FACTS

On October 28, 1987, Investigator Don Coleman of the Santa Ana Police Department received a telephone call from United States Drug Enforcement Agent John McCarthy from Hawaii. Agent McCarthy informed Investigator Coleman that Agent McCarthy had seized a package containing a picnic cooler. Inside the cooler the agent had found nine clear bags of marijuana. The bags were approximately 12" by 4" by 3" and each contained about two pounds of marijuana. The package was addressed to a J.R. Daza at 805 West Stevens Avenue, Santa Ana, California. The package was to have been sent to the Federal Express Office at 700 East Alton in Santa Ana. McCarthy told Coleman that instead the agent would send the package to Coleman. The intent of the officers was to arrest the person who picked up the marijuana. (CT 64, 71; RT 20.)

McCarthy sent the package to Coleman who received it on October 29, 1988. Coleman opened the package and found the marijuana in the manner Agent McCarthy had described. Investigator Coleman repackaged the box. He then contacted Mike Cole, the senior operations manager at the Federal Express Office. Coleman told Cole that Coleman wanted to leave the package at Federal Express and then arrest the person who picked it up. Cole took the package and kept it under lock. (CT 64, 71; RT 20.)

The next day, Investigator Coleman went back to the Federal Express Office. He examined the package containing marijuana. The package was still under lock. It had not been tampered with. The wrapping was the same. A small mark Coleman had placed on the package was still there. (CT 64, 71; RT 20.)

A telephone number, apparently on the delivery instructions from the shipper, was checked through the Santa Ana Police Department facilities and found to belong to a Jamie R. Daza at 807 West Stevens, Apartment #12 in Santa Ana. A check of Daza's California driver's license confirmed this same address. At about 10:30 a.m., a man who identified himself as Jamie Daza went to the Federal Express Office and picked up the package. Daza placed the package in his car and drove to his apartment on West Stevens. He carried the package into the apartment. (CT 64, 71; RT 20.)

Around 11:45 a.m., surveilling officers saw Daza exit his apartment and drop the paper and box that had contained the marijuana into a trash bin. (CT 65; RT 3.) At this time Investigator Coleman left the scene to get a search warrant. (CT 65; RT 3.)

Around 12:10 p.m., co-defendant St. George was seen by officers exiting the residence wearing a blue knapsack. The knapsack appeared to be half full. Fearing the loss of evidence, the officers stopped and detained him after he had left the apartment as he tried to drive out of the complex. The knapsack was searched and one and one-half pounds of marijuana was found. (RT 4; CT 65.)

Around 12:30 p.m., respondent arrived at the scene. He walked to apartment 12 and entered. Respondent had nothing in his hands. He exited about ten minutes later carrying a brown lunch bag that appeared to be full and about the appropriate size of the wrapped marijuana packages that Agent McCarthy had seen. Respondent was then observed to leave the apartment and walk to a silver Honda in the parking lot. He placed the brown lunch bag in the trunk of the Honda and

then attempted to leave. In order to prevent the possible loss of evidence from the apartment under surveillance, respondent's car was stopped by a marked police car. The trunk was opened, as was the bag, and inside the brown bag the officers found one-quarter to one-half pound of marijuana. (CT 65.)

The search warrant issued at 12:40 p.m. (See People's Exh. A at the suppression hearing.) Shortly thereafter, Investigator Coleman returned with the search warrant. The apartment was searched and numerous bags of marijuana were found. (CT 71, 74.)

ARGUMENT

I

THE SEARCH OF THE PAPER LUNCH BAG IN THE TRUNK OF THE VEHICLE WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

The California Court of Appeal held that the officers illegally searched the paper lunch bag found in the trunk of the car, holding that the search fell within the dictates of *Arkansas* v. *Sanders*, 442 U.S. 753, (1979), and *United States* v. *Chadwick*, 433 U.S. 1, (1977), rather than those of *United States* v. *Ross*, 456 U.S. 798, (1982). The pertinent part of the ruling is summarized by the following quotation:

> "`If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. [Citations.] If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in the

> car, he must detain the container and delay his search until a search warrant is obtained. [Citations]'" (*People* v. *Acevedo*, 216 Cal.App.3d 586, 591-592 (1989), quoting from *Castleberry* v. *State*, 678 P.2d 720, 724, (Okla.Crim.App. (1984).)[2]

The Court of Appeal then went on to hold that since the officers had particularized probable cause to believe that there was contraband in a particular location, in this case the paper lunch bag, rather than generalized probable cause that there was contraband somewhere in the vehicle, the officers were required to obtain a search warrant before opening the closed paper lunch bag. (*People* v.

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2. The decision of the Oklahoma court was taken to this Court in *Oklahoma* v. *Castleberry*, 471 U.S. 146, (1985). This Court granted certiorari but Justice Powell disqualified himself from the case. After oral argument the remaining eight justices deadlocked on the question presented. This case presents the exact question that the Court could not resolve in *Castleberry*.

Acevedo, *supra*, 216 Cal.App.3d at pp. 592-593.)

Respondent contends that the ruling of the Court of Appeal is at odds with the holding of this Court in *United States* v. *Ross*, *supra*. In *Ross*, this Court specifically held that once probable cause exists to believe that a vehicle contains contraband the entire vehicle may be searched without a warrant and the "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 823.)

Respondent submits that the holding of the Court of Appeal conflicts not only with *Ross*, but also with Fourth Amendment law with regard to the automobile exception to the general rule requiring a search warrant. (Cf. *Colorado* v.

Bannister, 449 U.S. 1, (1980); *Texas* v. *White*, 423 U.S. 67, (1975); *Chambers* v. *Maroney*, 399 U.S. 42, (1970); *Carroll* v. *United States*, 267 U.S. 132, (1925).)

The clear holding in *Ross* is that if "probable cause justifies the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 825.) *Ross* stems from this Court's earlier automobile exception cases. Those cases recognized that the unique mobility of a motor vehicle gave rise to exigent circumstances justifying a search without a warrant. (*Carroll* v. *United States*, *supra*, 267 U.S. 132 at pp. 151-154; *United States* v. *Ross*, *supra*, at pp. 818-820.) What the Court of Appeal failed to recognize in the case at bar is once the bag was placed in the automobile, it acquired the same degree of

mobility as the vehicle itself. Respondent's independent and intentional action of placing the bag in the car showed an intent to move the bag from its original location. His driving of the car was the precise mobility that justified the searches in *Ross* and *Carroll*. Given such a clear demonstration of mobility, the exigent circumstances of mobility encompassed the bag itself and no search warrant was required.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 809.)

Moreover, the holding in the case at bar is premised on the privacy expectation that attaches to a closed container. (*People* v. *Acevedo*, *supra*, 216 Cal.App.3d at p. 590, citing to *United States* v. *Chadwick*, *supra*, 433 U.S. 1.) But this

Court has already rejected the concept that such an expectation of privacy standard has greater sway than the earlier inherent mobility-exigent circumstances standard. In *California* v. *Carney*, 471 U.S. 386, 393, (1985), this Court rejected a claim that the expectation of privacy surrounding the residency aspects of a motor home superseded the exigencies created by the mobility of the motor home. The potential mobility of the motor home was dispositive. (*Id.* at p. 393.) Since the mobility factor is paramount, it should have been similarly dispositive in the case at bar and fully justified the search of the paper lunch bag.

It is not rational to make the distinction between whether a search warrant should be obtained based upon whether or not the officers had sufficient knowledge that the contraband was in a specific container in a specific part of

the vehicle as opposed to being in the vehicle generally. As Professor LaFave has noted, such a holding would mean that police officers may actually be able to broaden their power to make warrantless searches by limiting their accumulation of probable cause. (LaFave, *Search and Seizure*, Second Edition, Section 7.2(d), page 58 (1987).) Indeed, even the California Court of Appeal recognized the "anomalous nature of the *Ross-Chadwick* dichotomy. . . ." The court noted that it was creating an "incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of *Ross*." (*People* v. *Acevedo*, *supra*, 216 Cal.App.3d at p. 592.) The purpose of the exclusionary rule is to encourage future police conformance with the dictates of the Fourth Amendment, not to reward them for creative avoidance. Yet the holding in

the case at bar is admittedly at odds with the goal of encouraging compliance with the letter and spirit of the Fourth Amendment.

Such a rule not only flies in the face of logic but is also clearly contrary to the stated desire of this Court to formulate straightforward, workable rules regarding the searches of vehicles to allow the police to make proper decisions regarding the search of vehicles. (*United States* v. *Belton*, 453 U.S. 454, 458, (1981).) This Court has held that a "`single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (*United States* v. *Belton*, *supra*, at p. 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214, (1979).) The need for

straightforward and predictable rules is in the interest of both the police and the citizens who may be subjected to police activity. (*United States* v. *Belton*, *supra*, 453 U.S. at pp. 459-460.)

The rule formulated in *Ross* is clear, logical and should be applied to the situation in the case at bar. A rule requiring a warrant when there is particularized probable cause will further cloud what this Court described in *Ross* as "this troubled area." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 817.) Instead of the straightforward rule of *Ross* which looks to the overall existence of probable cause to search the vehicle and its contents, endless litigation over whether the officer knew of the location and container of the contraband will be inevitable. A far more workable rule is the holding in *Ross* that if "probable cause justifies the search of a lawfully

stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (*United States* v. *Ross*, *supra*, 456 U.S. at p. 825.) Such a rule establishes the type of "bright line" this Court has sought to assist peace officers in their difficult tasks.[3/] Thus, this Court's earlier decision in *United States* v. *Chadwick*, *supra*, 433 U.S. 1, should be held to have been overruled by *Ross* in situations such as the one in the case at bar.

Moreover, the holding in the case at bar creates severe difficulties for peace officers in the performance of their duties. In a situation where officers have sufficient justification to stop a

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3. Of course, the fact that at the actual moment of the search the car and hence the bag were immobile is irrelevant since it is the potential for mobility that controls. (*Michigan* v. *Thomas*, 458 U.S. 259, 261, (1982); *per curiam*.)

car for transporting narcotics in a particular container within a vehicle, what are the officers to do with the citizens while they go through the often lengthy and laborious task of obtaining a warrant? The probable cause needed for arrest is inside the bag and the bag cannot be legally opened. The officer might detain the citizens but a detention of such length at some point becomes an arrest. (*Florida* v. *Royer*, 460 U.S. 491, 501-502, (1983).) Thus while the officers are trying to obtain a warrant they may run the very real risk of inadvertently arresting a citizen before the contraband is found. Thus, compliance with the rule espoused by the Court of Appeal in this case may result in the officers making arrests. A far better rule would be to hold that such containers come with the holding in *Ross*. Thus officers could quickly resolve the situation, promptly

arresting criminals while speedily allowing law abiding citizens to proceed on their way. The rule created by the Court of Appeal will ensnare officers and citizens in time consuming and unnecessary waits to procure warrants.

Since the facts of this case reveal there was probable cause to believe respondent's car contained contraband, the rationale of *United States* v. *Ross, supra,* should apply. When the closed container was placed into the car by the respondent, it became as moveable as the car and thus the exigent circumstances covering the car applied to the paper lunch bag as well. Thus, the Court of Appeal erred in failing to uphold the search of the paper lunch bag without a warrant.

AFFIDAVIT OF SERVICE BY MAIL

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No:
October Term, 1989

THE STATE OF CALIFORNIA,
Petitioner,

v.

CHARLES STEVEN ACEVEDO,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICIES as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Theodore A. Cohen
433 N. Camden Drive, Ste. 900
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California Supreme Court
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San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 27th day of April, 1990.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 27, 1990.

Robin Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 27th day of April 1990.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

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PEOPLE OF THE STATE OF CALIFORNIA,

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

CERTIFIED FOR PUBLICATION

[Filed December 12, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	G007480
v.	)	(Super. Ct. No.
CHARLES STEVEN ACEVEDO,	)	C-68857)
Defendant and Appellant.	)	OPINION

Appeal from the judgment of the Superior Court of Orange County, Myron S. Brown, Judge. Reversed with directions.

Theodore A. Cohen for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney Genera, Jarelle B. Davis and Robert M. Foster,

Deputy Attorneys General, for Plaintiff and Respondent.

Charles Acevedo's motion to suppress was denied, and he pleaded guilty to possession of marijuana for sale. Under compulsion of United States Supreme Court authority, we agree the warrantless search of a lunch bag seized from the trunk of his car was unlawful and reverse accordingly.

I

In October 1987, federal drug enforcement agents in Hawaii seized a Federal Express package containing a cooler and nine clear bags of marijuana addressed to J.R. Daza at 805 West Stevens Avenue in Santa Ana. In cooperation with federal officials, Santa Ana police confirmed Daza's address and telephone number and left the package at the local Federal Express office for pickup.

Police followed Daza home after he retrieved the package. Daza left his apartment approximately 45 minutes later and discarded the wrapping and cardboard box in a trash bin. One of the surveilling officers went to obtain a search warrant for the apartment.

Within one-half hour, Acevedo's codefendant, Richard St. George, also walked out of the apartment, a blue knapsack on his back. Officers detained St. George, searched the knapsack, and found more than a pound of marijuana inside.

Within another half hour, an empty-handed Acevedo entered the apartment. He left ten minutes later carrying a brown lunch bag which appeared to be full. He placed the bag in the trunk of an automobile and drove away. Fearing the loss of evidence, police officers stopped the car, opened the trunk, searched the

brown bag, and discovered marijuana. The search warrant for the apartment arrived soon after.

In the superior court, Acevedo contended the officers lacked probable cause to search the trunk of the car. He also argued the officers could not open the lunch bag without a warrant. We disagree with the first contention, but the second carries the day.

II

Acevedo relies on *People* v. *Valdez* (1987) 196 Cal.App.3d 799 to support his claim that the trunk search was without probable cause. In *Valdez* a film canister containing contraband was suppressed because officers had no probable cause for its seizure: Nothing connected the defendant to the sale of illegal drugs; and a canister "is not a distinctive drug-carrying item equivalent to a heroin balloon, a paper bindle, or a marijuana-

smelling brick-shaped package, which may be seized upon observation." (*Id.*, at pp. 806-807.) Here, however, there was more than a fair probability Acevedo was involved in dealing drugs and carrying marijuana in the lunch bag (*Illinois* v. *Gates* (1983) 462 U.S. 213, 238): Although the occupant of the apartment was not in, an empty-handed Acevedo entered within two hours of the arrival of a sizeable quantity of contraband and emerged with something in a brown paper bag which approximated the size of the wrapped packages officers knew contained marijuana. Accordingly, there was probable cause for a warrantless search of the trunk and seizure of the brown bag under the automobile exception to the Fourth Amendment. (See generally *United States* v. *Ross* (1982) 456 U.S. 798.)

/

/

III

But could the officers open the bag they lawfully seized? They could not without first obtaining a warrant.

That is the rule of a line of cases headed by *United States* v. *Chadwick* (1977) 433 U.S. 1. There, federal agents had probable cause to believe marijuana was concealed in a footlocker located in the trunk of a car. The occupants were arrested, and the footlocker was seized and searched without a warrant. The Supreme Court found the search unlawful. There are, ruled the court, significantly greater privacy interests in personal luggage as opposed to cars: "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal affects." (*Id.*, at p. 13.)

In *United States* v. *Ross*, *supra*, 456 U.S. 798, on the other hand, officers had

probable cause to believe narcotics were being sold from the trunk of the defendant's vehicle. Police stopped the car, saw a bullet on the front seat, and retrieved a pistol from the glove compartment. The defendant was arrested, and officers opened the car's trunk and removed a brown paper bag. They searched it and found heroin. They discovered additional contraband in a zippered pouch. The Supreme Court upheld the warrantless search, distinguishing *Chadwick* on the basis that probable cause to search was limited to the footlocker in that case. In *Ross*, however, "police officers had probable cause to search respondent's entire vehicle." (*Id.*, at p. 817, emphasis added.)[1/]

1.*Ross* did reject the suggestion in *Arkansas* v. *Sanders* (1979) 442 U.S. 753, 764, footnote 13 that a warrant may always be required to search containers found in a vehicle. (*United States* v. *Ross*, *supra*, 456 U.S. at p. 824.)

This distinction was more recently noted in *United States* v. *Johns* (1985) 469 U.S. 478. There, customs officers developed probable cause to believe marijuana had been smuggled into parked trucks at a remote private airstrip. Federal agents approached the trucks, detected the odor of marijuana, and saw packages likely to contain contraband. The packages were seized and searched without a warrant.

Chadwick was inapplicable, determined the Supreme Court, because the customs officers "were unaware of the packages until they approached the trucks, and contraband might well have been hidden elsewhere in the vehicles . . . [T]he Customs officers had probable cause to believe that not only the packages but also the vehicles themselves contained contraband. . . . [T]he police [in *Chadwick*] had no probable cause to believe

that the automobile, as contrasted to the footlocker, contained contraband." (*Id.*, at pp. 482-483.)

Shortly after *Johns* the Supreme Court divided equally in affirming without opinion a decision of the Oklahoma Court of Criminal Appeals to suppress evidence obtained under circumstances similar to ours. (*Oklahoma* v. *Castleberry* (1985) 471 U.S. 146.) In *Castleberry* v. *State* (Okla. Crim. App. 1984) 678 P.2d 720, police officers knew the defendant carried narcotics in blue suitcases in the trunk of a car. After arresting him, they opened the trunk, seized the suitcases, and searched them without a warrant. Relying on *Chadwick* and *Sanders*, the Oklahoma appellate panel determined the contraband should have been suppressed: "If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly

where, he may search the entire car as well as any containers found therein. [Citations.] If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in the car, he must detain the container and delay his search until a search warrant is obtained. [Citations.]" (*Id.*, at p. 724.)

The Ninth Circuit, on facts remarkably close to those of the present case, has also confirmed the continuing validity of the *Chadwick-Ross* distinction. In *United States* v. *Salazar* (9th Cir. 1986) 805 F.2d 1384, 1396, police officers observed known drug dealers deliver suspicious-looking packages to others. The recipients were detained, and a search of the packages revealed cocaine. Officers then saw the dealers hand a brown shopping bag to Salazar, who placed the item in a locked car. Salazar was stopped

as he drove away, and the bag was seized and searched. Citing *Chadwick*, the Court of Appeals concluded a warrantless search of the bag was unlawful: "Where, prior to a search, officers have probable cause to believe that a specific closed container holds contraband . . . , they must obtain a search warrant before opening it, even though it is located in an automobile. [Citation.]" (*Id.*, at p. 1397.)

We recognize the anomalous nature of the *Ross-Chadwick* dichotomy: If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located <u>somewhere</u> in an automobile, officers may conduct a warrantless search

of any container in the car that could reasonably conceal the evidence. The first situation was described by Justice Kaus in *People* v. *Ruggles* (1985) 39 Cal.3d 1 as "type A" and the second "type B." The crucial distinction is that in a type A case "officers do not have probable cause to believe the vehicle itself -- as distinguished from the container -- contains seizable material." (*Id.*, at p. 14 (dis. opn. of Kaus, J.).)

One unfortunate feature of the rule is an incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of *Ross*. Despite misgivings concerning the continuing validity of *Chadwick* after *Ross*, we are in no position to ignore the Supreme Court's current mandate. This is a type A case; the officers had probable cause to believe marijuana would be found only in a brown

lunch bag and nowhere else in the car. We are compelled to hold they should have obtained a search warrant before opening it.

The Attorney General raises several arguments in support of the search. He contends the warrant issue was waived. But the record indicates the parties stipulated to a statement of facts (with minor additions) taken from the prosecutor's responding papers below and both sides would stipulate to additional facts as issues arose. Acevedo's counsel argued, "Now, then according to *Castleberry*, which is a Ninth Circuit [sic] case, according to that they have to have a search warrant to search the bag." Counsel's citation may have been skewed but it was adequate to place the necessity of a warrant at issue. We agree the statement of facts is thin regarding the actual search of the trunk and lunch bag,

but the failure of the record on this point is the responsibility of the prosecutor who had the burden to establish the reasonableness of the search and failed to present additional facts or testimony.

The Attorney General also argues, "[s]ince the officers had probable cause to arrest appellant they had the right to search the entire car and any objects in the car." This argument misstates the law, however, for police may only search the passenger compartment of a car incident to a lawful arrest. (*New York* v. *Belton* (1981) 453 U.S. 454.) The *Chadwick-Ross* line of cases applies to trunk searches.

The Attorney General urges application of the inevitable discovery doctrine, claiming the warrant which arrived shortly after the search of the bag would have authorized its search as

part of the contents of the apartment and that the police could have secured the premises pending the arrival of the warrant and prevented its departure. He cites no evidence in the record of legal authority to support these propositions. Police officers have no right to track down an item in the vehicle or home of another merely because certain items expected to be found in the place subject to the warrant happen to be missing when it is executed. The warrant authorized the search of Daza's apartment, not a third party's vehicle or bag located far from the premises.

We need not decide whether a warrant would have been issued for the unopened bag in police custody. The bag itself was innocuous, and the police knew nothing of Acevedo before he visited Casa Daza. But the argument is beside the point. If warrantless searches could be upheld on an

inevitable discovery theory on the basis that a warrant <u>would</u> have issued, no one would bother to secure one.

We are aware that the California Supreme Court has recently said, "We further note that the evidence seized in the house inevitably would have been discovered. [Citations.] The officers who initially entered the . . . house observed blood throughout. It appeared likely that the killer had entered the house and showered; relevant evidence was probable inside. The house was secured and, as the trial court noted, `there is not a judge in the world that would not sign a warrant with these facts.'" (*People* v. *McDowell* (1988) 46 Cal.3d 551, 564.) We view this language as unfortunate dicta, sure to cause mischief and sure to be recanted by our Supreme Court or rejected by the United States Supreme Court should the occasion arise.

[2/] Until one of the two higher courts holds otherwise, we cannot accept the spurious notion that probable cause to obtain a search warrant is the equivalent of having done so: "Searches conducted without warrants have been held unlawful `notwithstanding facts unquestionably showing probable cause' [citation], for the Constitution requires `that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . .'" (*Katz* v. *United States* (1967) 389 U.S. 347, 356-357; see also *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 639.)

2.We do not understand our concurring colleague's refusal to react to the *McDowell* language we question. It is cited in the Attorney General's brief, and it was specifically urged as biding authority at oral argument for the proposition that probable cause sufficient to obtain warrant is in and of itself enough to uphold a warrantless search.

Finally, the Attorney General claims transportation of the marijuana was a separate crime and the car itself became evidence which could have been seized and searched. Whether the scope of that search would permissibly reach closed containers during an inventory of the vehicle we need not address. This argument was not presented in any fashion below: "If the People had other theories to support their contention that the evidence was not the product of illegal police conduct, the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal." (*Lorenzana* v. *Superior Court*, *supra*, 9 Cal.3d at p. 640; *People* v. *Neer* (1986) 177 Cal.App.3d 991, 1006 (dis. opn. of Crosby, J.); *United States* v. *Salazar*, *supra*, 805 F.2d at pp. 1398-1399.)

The judgment is reversed with directions to grant the motion to suppress.

Crosby, Acting P.J.

I concur:

Wallin, J.

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SONENSHINE, J., concurring:

I concur with the result but withhold judgment at this time on the import of the quoted language of *People* v. *McDowell* (1988) 46 Cal.3d 551. I believe that analysis is unnecessary to the opinion, in that the Attorney General's inevitable discovery argument is not based on the theory a different warrant would have issued from any "judge in the world." Rather, he argues "the officers could have searched the bag under the auspices of the warrant that arrived ten minutes later," rendering it "independently admissible under the doctrine of inevitable discovery." Therefore his argument is not that a warrant would have issued, it is that one did issue and that the issued warrant inferentially encompassed the bag. The majority addresses the contention, but by disposing of an argument not raised by

the parties, it is erecting a straw person to knock down.

/s/

SONENSHINE, J.

APPENDIX B

APPENDIX B

CERTIFIED FOR PUBLICATION

[Filed December 20, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	G007480
Plaintiff and Respondent,	)	(Super. Ct. No. C-68857)
v.	)	
CHARLES STEVEN ACEVEDO,	)	ORDER MODIFYING CONCURRING OPINION, NO CHANGE IN JUDGMENT
Defendant and Appellant.	)	

THE COURT:

It is ordered that the concurring opinion filed herein on December 12, 1989, be modified in its entirety as follows:

I concur with the result but withhold judgment at this time on the import of the quoted language of *People* v. *McDowell* (1988) 46 Cal.3d 551. I believe that

analysis is unnecessary to the opinion, in that the Attorney General's inevitable discovery argument was not based on the theory a different warrant would have issued from any "judge in the world." Rather, he argued, "the officers could have searched the bag under the auspices of the warrant that arrived ten minutes later," rendering it "independently admissible under the doctrine of inevitable discovery." Therefore his argument was not that a warrant would have issued, it was that one did issue and that the issued warrant inferentially encompassed the bag.

Contrary to the majority's opinion, my review of respondent's brief reveals not a single citation to *McDowell*. While respondent did attempt to inject such an analysis for the first time during oral argument, I believe the issue was not timely raised. The majority addresses the

contention, but by disposing of an argument not properly raised by the parties, it is erecting a straw person to knock down.

There is no change in judgment.

CERTIFIED FOR PUBLICATION

s/SONENSHINE
SONENSHINE, J.

APPENDIX C

APPENDIX C

CERTIFIED FOR PUBLICATION

[Filed December 29, 1989]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	G007480
Plaintiff and Respondent,	(Super. Ct. No. C-68857)
v.	
CHARLES STEVEN ACEVEDO,	ORDER MODIFYING OPINION
Defendant and Appellant.	

The opinion in this matter was filed December 12, 1989, and certified for publication. The majority opinion is modified as follows:

(1) On page 10, line 14, insert "2" at the end of the sentence which concludes, "should the occasion arise."

(2) Delete footnote 2 in its entirety and substitute the following in its place:

2 We do not understand our concurring colleague's refusal to come to grips with the *McDowell* language we question. It was specifically urged as binding authority at oral argument for the proposition that probable cause sufficient to obtain a warrant is in and of itself enough to uphold a warrantless search; it must be addressed.

The modification does not effect a change in the judgment.

Crosby, Acting P.J.

I concur:

Wallin, J.

APPENDIX D

APPENDIX D

CERTIFIED FOR PUBLICATION

[Filed January 03, 1990]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES STEVEN ACEVEDO, Defendant and Appellant.	G007480 (Super. Ct. No. C-68857) ORDER MODIFYING CONCURRING OPINION, NO CHANGE IN JUDGMENT

The concurring opinion filed herein on December 12, 1989, certified for publication, and modified December 20, 1989, is further modified as follows:

Delete the introductory phrase "Contrary to the majority's opinion," at the beginning of the second paragraph.

/

There is no change in judgment.

s/SONENSHINE
SONENSHINE, J.

APPENDIX E

APPENDIX E

[Filed March 15, 1990]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G007480

S013758

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

CHARLES STEVEN ACEVEDO

Respondent's petition for review DENIED.

Panelli, J. is of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

NO. A-783 (89-1690)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CHARLES STEVEN ACEVEDO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals fully considered and correctly decided whether respondent's Fourth Amendment rights were violated when officers searched and seized without a warrant the brown paper lunch bag in respondent's automobile trunk.

2. Whether Chadwick, Sanders and Castleberry, were distinguishable from Ross so that the decision of the Court of Appeal was correctly decided in light of the facts of the instant case.

PARTIES TO PROCEEDINGS

Petitioners are the People of the State of California and the Respondent is CHARLES STEVEN ACEVEDO.

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NO. A-783 (89-1690)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CHARLES STEVEN ACEVEDO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, CHARLES STEVEN ACEVEDO, respectfully prays that a Writ of Certiorari be denied to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, Civil No. G007480, issued on December 12, 1989.

OPINIONS BELOW

The opinion of the Court of Appeal in this case is reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23. It is also included in petitioner's Appendix A to the Petition for Writ of Certiorari.

The first order modifying the concurring opinion is reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23, and included in Petitioner's Appendix B to the Petition. The second order

modifying the concurring opinion is also reported at 216 Cal.App.3d 586, 265 Cal.Rptr 23, and is included in Appendix C to the Petition.

The order of the California Supreme Court denying the Petition for Review on direct appeal was entered in the Official Minutes of that Court and reported in the Official Advance Sheets of the California Supreme Court. The Minute Order is reproduced in Petitioner's Appendix E to the Petition for Writ.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition by invoking Title 28, United States Code Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeal in the State of California (see Petitioner's Appendix A, pages A-1 through A-4).

STATEMENT OF FACTS

See petitioner's Petition for Writ of Certiorari, pages 8 through 12.

REASONS FOR DENYING THE WRIT

There are two compelling reasons why the Petition should be denied.

First, the Court below fully considered and correctly decided the issue of whether the search of the paper lunch bag in the trunk of the vehicle belonging to respondent was justified under the automobile exception to the Fourth Amendment warrant requirement. Second, the decision below follows an unbroken line of authority and the Court's prior decisions are controlling .

I

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

Petitioner propounds that in the case at bar the Court of Appeal failed to recognize that once the bag was placed in the automobile, it acquired the same degree of mobility as the vehicle itself.

Petitioner has relied on United States v. Ross, 456 U.S. 798 (1982) which justified a warrantless search of an automobile that was believed to have been transporting contraband and petitioner argues that Ross applies with equal force to any movable container that is believed to be carrying an illicit substance within an automobile. However, Ross states, at page 817, "Unlike Chadwick

and Sanders, in this case police officers had probable cause to search respondent's entire vehicle." Ross recognizes the distinction between probable cause to search the whole vehicle and probable cause to search a container within a vehicle.

The Court of Appeals recognized, considered and ruled on the basis of the existing law stating:

> We recognize the anomalous nature of the Ross-Chadwick dichotomy: If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located somewhere in an automobile, officers may conduct a warrantless search of any container in the car that could reasonably conceal the evidence. People v. Acevedo, 216 Cal.App.3d 586 at 592.

The Acevedo court further relied on United States v. Salazar, 805 F.2d 1384 (9th Cir. 1986), in which officers saw "dealers" hand a brown shopping bag to Salazar who placed the bag in a locked car. Salazar was stopped as he drove away and the bag was seized and searched. Relying upon the decisions in United States v. Chadwick,

433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753, 761 n.8, 99 S.Ct. 2586, 2592 n. 8, 61 L.Ed.2d 235 (1979), the Salazar court concluded that a warrantless search of the bag was unlawful even though it was located in an automobile because:

> there is 'no greater need for warrantless searches of [containers] taken from automobiles than of [containers] taken from other places,' and that containers located in automobiles are not 'necessarily attended by any lesser expectation of privacy than is associated with [containers] taken from other locations.' 422 U.S. at 764, 99 S.Ct. at 2593. The Supreme Court has distinguished between searches of containers found in a car based upon probable cause that a specific container placed in a car contains contraband, and searches based upon a generalized belief that a car contains contraband somewhere inside. In the latter case, the entire vehicle, including closed containers found therein, may be searched to the same extent as if a magistrate had issued a warrant based on the probable cause relied on by the officers. Ross, 456 U.S. at 823, 102 S.Ct. at 2172. Where, prior to a search, officers have

probable cause to believe that a specific closed container holds contraband, however, they must obtain a search warrant before opening it, even though it is located in an automobile. 433 U.S.; see Ross, 456 U.S. at 813, 102 S.Ct. at 2166 (quoting Chief Justice Burger's concurrence in Sanders, 442 U.S. at 766-67, 99 S.Ct. at 2594). See also Castleberry v. State, 678 P.2d 720 (Okla.Crim.App. 1984), aff'd by equally divided Court sub nom. Oklahoma v. Castleberry, 471 U.S. 146, 105 S.Ct. 1859, 85 L.Ed.2d 112 (1985).

> Here, as in Sanders, the police officers could have taken the container seized with probable cause, along with the suspect, to the police station and obtained a warrant for search. See Sanders, 442 U.S. at 766, 99 S.Ct. at 2594. A closed paper bag shares the same degree of Fourth Amendment protection as the footlocker in Chadwick and the unlocked suitcase in Sanders. Id. at pp. 1397-1398.

Therefore, the court below fully considered and correctly decided the issues.

//

II

THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY

As is clear from the Acevedo opinion, the Court ruled that an officer could not open the lawfully seized bag without first obtaining a warrant. "That is the rule of a line of cases headed by United States v. Chadwick, 433 U.S. 1 (1977) . . . . " People v. Acevedo, 216 Cal.App.3d 586 at 590.

In Chadwick there was a double-locked footlocker which had been transported on a train and which narcotics agents had probable cause to believe contained narcotics. The footlocker was loaded into an automobile after being unloaded from the train after which the agents made an arrest. More than one hour elapsed from the time of arrest and the search of the footlocker. The Chadwick court held that:

> In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded. United States v. Chadwick, 433 U.S. 1 (1977) at pp. 15-16.

Sanders involved a warrantless search of a suitcase that police officers believed contained marijuana. An arrest was made by officers following a short chase of the respondents leaving an airport in a taxicab. Prior to the arrest officers searched the trunk of the taxicab without obtaining permission. The suitcase was found and searched. It contained marijuana. The Sanders court held that:

> We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search - after the police have seized the object to be searched and have it securely within their control. See 433 U.S. at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

. . . In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it appl'es to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where - as in the present case - the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of

> criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected. 422 U.S. at pp. 765-766.

The search of suitcases and a Band-Aid box was the subject of the Castleberry case wherein the defendants were arrested contemporaneously with the search. In Castleberry the Court held:

> The case at bar clearly falls within the Chadwick-Sanders line of cases. The suspected locations of the contraband were the suitcases

> and the Band-Aid box which Castleberry threw into the car. Accordingly, we hold that the motion to suppress was erroneously overruled. The officers should have detained the containers until a search warrant had been obtained. 678 P.2d at p. 724.

Petitioner further asserts that it is not rational to make the distinction between whether officers had knowledge that the contraband was in a specific container in a specific part of the vehicle as opposed to being in the vehicle generally. However, it is not only rational, but the Supreme Court created that exception when Ross was decided. The Ross rule carved out an exception to Chadwick-Sanders by allowing the officers to search the entire vehicle, including the containers when they had probable cause to believe that narcotics were being sold from the trunk of the vehicle. The Ross court recognized the Chadwick-Sanders rule stating at page 814:

> It is clear, however, that in neither Chadwick nor Sanders did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter.

Thus, it is abundantly clear that the Court of Appeal in Acevedo properly considered and distinguished Ross from Chadwick,

Sanders and Salazar. In addition, in Acevedo the court specifically recognized the Ross-Chadwick dichotomy by stating:

> If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located somewhere in an automobile, officers may conduct a warrantless search of any container in the car that could reasonably conceal the evidence. 216 Cal.App.3d at 592.

In Oklahoma v. Castleberry, 471 U.S. 146 (1985), the distinction between a known specific container and contraband somewhere in the car surfaces again. Even though the United States Supreme Court divided equally, it affirmed the decision to suppress evidence obtained in similar conditions as in the case at bar; to wit, police officers searched and seized a blue suitcase in the trunk of a car, without a warrant, knowing it contained narcotics.

Finally, in United States v. Johns, 469 U.S. 478 (1985), the distinction between Chadwick and Ross was again recognized by this Court. In Johns, officers seized trucks and searched their containers without a warrant because the customs officers had

probable cause to believe that the trucks contained contraband because of the smell emanating from them. Ibid. at pp. 482-483. In Johns, police had probable cause to believe that the vehicle, compared to the footlocker in the trunk of the car in Chadwick, contained contraband.

This Court has recognized the Acevedo factual situation since Chadwick and has consistently affirmed it. Therefore, this is not a new or novel set of circumstances and the Writ of Certiorari must be denied.

III

PRIOR DECISIONS ARE CONTROLLING

Petitioner urges that there is a need for straightforward and predictable rules. Relying on Ross, supra, petitioner's argument that there is an overall existence of probable cause to search this vehicle and its contents is pure fantasy.

Furthermore, the "bright line" petitioner is seeking has already been set forth according to specific factual distinctions in Castleberry, Salazar, Chadwick and Johns. There is no reason to overrule Ross because Ross is still good law as it applies to the same set of facts as Ross -- where officers do not have sufficient information or knowledge that contraband may be in a specific container in a vehicle but have probable cause to believe the vehicle itself contains contraband, they may search it without a warrant.

Lastly, petitioner argues that the rule created by the Court

of Appeal will ensnare officers and citizens in time consuming and unnecessary waits to procure warrants. Petitioner fails to recognize the reason for the Fourth Amendment. It is the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures.

The line of cases relied upon by the Acevedo Court of Appeal are controlling under the circumstances presented by this case. Thus, there is no need for review of this matter.

CONCLUSION

WHEREFORE, respondent prays that this Court deny the Writ of Certiorari.

Respectfully submitted,

FRED W. ANDERSON
Attorney for Respondent

No. 89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

JOINT APPENDIX

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Attorney for Petitioner

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PETITION FOR CERTIORARI FILED
April 30, 1990
CERTIORARI GRANTED October 1, 1990

JOINT APPENDIX

Chronological List of Dates on Pleadings Filed; Hearings Held, and Orders Entered	JA-1
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CHRONOLOGICAL LIST OF DATES ON PLEADINGS FILED; VERDICTS AND SENTENCE

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

People v. Charles Steven Acevedo
No. C-68857

DATE	PROCEEDINGS
06/24/88	Information Filed
10/07/88	Motion to Suppress Evidence Denied
10/12/88	Acevedo Pleads Guilty
10/12/88	Acevedo Sentenced; Probation Granted

[Clerk's Transcript p. 2]

Filed in open Superior Court of the State of California, in and for the County of Orange, on motion of the District Attorney of said County, this 24th day of June, 1988.

GARY L. GRANVILLE, COUNTY CLERK

BY: /s/ Juliana M. Boyd Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. RICHARD BRIAN ST. GEORGE aka: Mark Brent Rich CHARLES STEVEN ACEVEDO Defendant(s)	)	CASE NO. C-68857 INFORMATION

THE DISTRICT ATTORNEY OF ORANGE COUNTY hereby accuses the aforenamed defendant(s) of violating the law at and within the County of Orange as follows:

COUNT I: On or about October 30, 1987, RICHARD BRIAN ST. GEORGE and CHARLES

STEVEN ACEVEDO, in violation of Section 11359 of the Health and Safety Code, a FELONY, did willfully and unlawfully have in his possession, for purpose of sale, marijuana.

Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

DATED: June 24, 1988

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE
STATE OF CALIFORNIA
BY: /s/
Deputy District Attorney

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[Clerk's Transcript pp. 64-65]

CECIL HICKS,
DISTRICT ATTORNEY
COUNTY OF ORANGE,
STATE OF CALIFORNIA
MICHAEL R. CAPIZZI,
CHIEF ASSISTANT
DISTRICT ATTORNEY-
MAURICE L. EVANS,
ASSISTANT
DISTRICT ATTORNEY
THOMAS M. GOETHALS,
DEPUTY-IN-CHARGE
WRITS AND APPEALS SECTION

BY: MICHAEL JACOBS
DEPUTY DISTRICT ATTORNEY

P.O. BOX 8089
SANTA ANA, CALIFORNIA 92702
TELEPHONE: (714) 834-3600

Attorneys for Plaintiff

DEPT: 5
HG DATE:9/30/88
EST TIME:1 HR

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHARLES STEVEN ACEVEDO, Defendant,	CASE NO. C-68857 POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS (P.C.1538.5) (De Novo Testimony Required)

ANTICIPATED STATEMENT OF FACTS

On October 28, 1987 Investigator D. Coleman of the Santa Ana Police Department received a call from DEA agent John McCarthy in Hawaii informing him that a package addressed to J.R. Daza at 805 W. Stevens Avenue, Santa Ana, California 92704, had been seized by the authorities and found to contain contraband. The package was to be sent to the Federal Express Office at 700 W. Alton in Santa Ana. The package contained a picnic cooler containing nine clear bags of marijuana. This package was placed into the mail and shipped to Officer Coleman of the Santa Ana Police Department. On October 29th, Officer Coleman received the package, opened it to examine its contents, then readdressed it to J.R. Daza, 805 W. Stevens Avenue, Santa Ana, California 92704. It was then left at the

Federal Express Office in Santa Ana California.

At approximately 10:30 a.m. on October 30, 1987, J.R. Daza picked up the package and was then followed back to his residence at 807 W. Stevens #12, by Santa Ana police officers. He was observed to take the package inside at approximately 11 a.m. Officers Cousin and Andrade took a position of surveillance while Investigator Coleman left to obtain a search warrant. [At 11:45 a.m. surveilling officers saw Mr. Daza exit the residence and dropped the paper and box which had contained the cooler holding the marijuana into a trash bin. At that time Officer Coleman left the scene to obtain a search warrant.][1/]

Shortly thereafter, at 12:10 p.m., Defendant St. George, was observed by

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1. These words were added by stipulation at the hearing on the motion to suppress. (See RT 2-5, JA 30-33.)

Officers Andrade and Cousin exiting the residence wearing a blue knapsack. The knapsack appeared to be half full. To prevent the possible loss of evidence while waiting for the search warrant, Defendant St. George was then stopped and detained by Officer Morehouse [after he left the complex].[2/] Subsequently, St. George was arrested after the officers found approximately one and a half pounds of marijuana in his knapsack.

At approximately 12:30 p.m., Defendant Acevedo was observed to walk into apartment #12. He was not carrying any packages at that time. He exited 10 minutes later carrying a brown lunch bag that apperaed [sic] to be full. He was then observed to leave the apartment and walk to a silver Honda in the parking lot. He was observed to place the brown lunch

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2. These words were added by stipulation at the hearing on the motion to suppress. (See RT 2-5, JA 30-33.)

bag inside the trunk of the vehicle before he attempted to leave. In order to prevent the possible loss of evidence from the apartment under surveillance, he was stopped by a marked police car. Investigator Flores opened the [locked][3/] trunk of the vehicle, opened the brown bag, and found it to contain approximately 1/4 to 1/2 pound of marijuana.

At 12:40 p.m., a search warrant was served on the premises at 807 W. Stevens #12, Santa Ana. The items seized from the residence are itemized in the Return to Search Warrant which is attached hereto, along with the Search Warrant, and Affidavit, as "Exhibit A"

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3. This word was added by stipulation at the hearing on the motion to suppress. (See RT 2-5, JA 38.)

[Clerk's Transcript p. 70-73]
EXHIBIT A
STATE OF CALIFORNIA - COUNTY OF ORANGE
SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

/S/ DON COLEMAN, bewing sworn, says that
(Name of Affiant)

on the basis of the information contained within this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/S/ Don Coleman. NIGHT SEARCH REQUESTED:
(Signature of affiant)

YES [ ] NO[X]

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN

THE COUNTY OF ORANGE proof by affidavit having been made before me by DON COLEMAN, (Name of Affiant) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "x"(s) in that it:

__ was stolen or embezzled

X was used as the means of committing a felony.

X is possessed by a person with the intent to use it as means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery

X tends to show that a felony has been committed or that a particular person has committed a felony

tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3 has occurred or is occurring:

YOU ARE THEREFORE COMMANDED TO SEARCH:

(premises, vehicles, persons)

PREMISES: 807 W. Stevens, Apt. #12, Santa Ana, Orange County, California. It is a two story apartment building with beige stucco and brown wood trim. The front door faces east with the number "12" attached to the front door. The numbers "807" are attached to the south side of the building.

VEHICLES: Black, Honda Civic, California license #GIH260.

PERSON(S): "John Doe", Male, Mexican, approx. 5'8", 140 lbs, brown hair.

If found at 807 W. Stevens, Apt. #12, Santa Ana, Calif.

FOR THE FOLLOWING PROPERTY:

Marijuana and items commonly associated with storage and use of marijuana consisting of sifters, baggies, scales and other weighing devices. Also, articles of personal property tending to establish the identity of persons in control of the premises consisting of utility receipts, rent receipts and cancelled mail envelopes. Also, records of narcotics transactions, telephone records, notes of monies paid and owed, quantities of marijuana ordered by purchasers and money received through narcotics sales including the following U.S. currency:

Also to answer, listen, record, monitor, note, converse with callers who appear to be calling in regards to drug sales on the telephone or answering machine or device to return any calls left on any answering machine or device, or any telephone beeper

or pager located within the location, with revealing officers' identity.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to and subscribed before me this 30th day of October, 1987, at 12:40 p.m. Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

/s/ Gary P. Ryan, NIGHT SERVICE

APPROVED: YES [ ] NO [X]

(Signature of Magistrate)

Judge of the Municipal Court, /s/

Judicial District

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STATEMENT OF PROBABLE CAUSE

Your affiant says that the facts in support of the issuance of the Search Warrant are as follows: That you affiant is a sworn police officer and has been so employed for five (5) years.

That your affiant, while acting in said capacity, has received the following information: On 10-28-87, your affiant received a telephone call from D.E.A. Agent John McCarthy from Hawaii, phone number (808) 541-1936. He told your affiant he had seized a package containing a picnic cooler. This cooler contained nine clear bags of marijuana. These bags were approximately 12" x 4" x 3" each containing approximately two pounds of marijuana. McCarthy told your affiant this package was opened by him and he found the marijuana. The package was addressed to a J.R. Daza at 805 W. Stevens Avenue, Santa Ana, CA 92704 with a phone

number of (714) 641-3874. This package was to be sent to Federal Express at 700 E. Alton in Santa Ana. McCarthy told your affiant he would ship the marijuana to your affiant. Our intent was to arrest the person who picked up the marijuana.

On 10-29-87, your affiant received the package. Your affiant opened it and found it to contain the marijuana as McCarthy had told your affiant about. Your affiant repackaged the box and contacted Mike Cole the Senior Operations Manager at Federal Express. Your affiant told him your affiant wante [sic] to leave the package and arrest the person who picked it up. He took the package and locked it in a room.

On 10-30-87, your affiant recontacted Mike Cole at the Federal Express. Your affiant examined the package containing the marijuana. It was still locked in the same room your affiant observed Cole lock

it in on 10-29-87. The package had not been tampered with. You affiant recognized the wrapping as the same wrapping your affiant wrapped the package in on 10-29-87. I also placed a very small mark on the wrapping and this mark was still there.

The telephone number was checked through Department resources and the number of 641-3874 came back to a Jaime R. Daza at 807 W. Stevens, #12, Santa Ana. A check of Jaime Daza's CDL found an address of 807 W. Stevens, #12. At approximately 1030 hours a subject who identified himself as Jaime Daza went to the front counter of the Federal Express and picked up the package. The suspect was approximately 5'8", 140 lbs., short brown hair wearing a long sleeve brown and white striped shirt and white pants. Your affiant observed this subject place the package containing the marijuana into the

rear of a black Honda Civic, license number 1GIH260. This subject was surveilled by the Santa Ana Narcotics Detail and the Santa Ana Career Criminal Unit to 807 W. Stevens, #12. Inv. Cousin then observed this subject remove the package from the vehicle and walk into apartment #12.

Your affiant's expertise consists of the following: Your affiant has been a sworn police officer for the last five years. Your affiant has worked as a Narcotics Investigator for the past one and one-half years. Your affiant has approximately 140 hours of school and training in packaging, sales, transportation and recognition of narcotics. Your affiant has qualified as an expert in the use of both heroin and cocaine in Municipal and Superior Courts in Orange County. Your affiant has made over 200 arrests for the use and influence

of cocaine and heroin. Your affiant has over 500 hours of surveillance experience and has purchased narcotics in an undercover capacity 15 times. Your affiant has made over 100 marijuana related arrests.

It is your affiant's expert opinion that this subject John Doe is in possession of this marijuana for the purpose of selling it. The size of the packages of the marijuana along with the large quantity, approximately 15 to 20 pounds, is consistent with the amount possessed for sales.

It has been your affiant's training and experience during the service of search warrants that we will find articles of personal property tending to establish the identity of persons in control of the premises consisting of receipts, rent receipts, cancelled mail envelopes, records of narcotic transactions,

telephone records, notes of money owed, quantities of heroin ordered by purchasers and names of purchasers, any telephone answering tapes or video cassette tapes.

/ / / approved: 10-30-87

/ / / /s/ David C. Velasquez DDA

/ / /

[Clerk's Transcript pp. 77]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF ORANGE

JUDGE: Leonard H. McBride
CLERK: Sharon Kupka
DATE 10-7-88
BAILIFF: Ray Lewis
REPORTER: Ron Gerratsen
TIME: 9 a.m. DEPT: 44
C-68857 People vs Acevedo, Charles Steven
(x) Hrg re: [ ] Trial [ ] Prob.

Violation [ ] Stay of Exec.

[x] 995 PC Motion [x] 1538.5 PC

Motion

[ ] Other:

(x) Deft in court with csl Fred Anderson

. . . . . .[4]

(x) Peo rep by Michael Jacobs Dep. D.A.

. . . . . .

(x) Court read moving papers & opposition & heard argument from counsel

People's P&A's modified by

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4. Dots indicate deletion of unused portions of trial court minute order forms.

interlineation. Counsel stipulated as to certain facts of the case. Court finds the police had reasonable cause to detain & search vehicles without a search warrant.

(x) Motion by deft denied as to 995 PC & 1538.5 PC motions.

. . . . . .

(x) 10-12-88 TD to remain

. . . . . .

(x) Regarding the 995 PC Motion Court finds the police officer had sufficient knowledge of marijuana to determine that what he found on deft. was marijuana. Motion denied.

Ext. 10-7-88

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JA-22

[Clerk's Transcript pp. 78-79]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MINUTE ORDER

Dept __ 5 ___ convened at __9 a.m.__

DATE 10-12-88

JUDGE: HONORABLE MYRON S. BROWN __ DEPUTY CLERK: F. Ray
BAILIFF: G.S. Crandall
REPORTER: Kathy D. Hoffman

CASE: C-68857 PEOPLE VS. Acevedo, Charles Steven

MATTER: Trial Chg of Plea P&S

(x) Deft. (x) In Court (x) With csl. Fred W. Anderson

(x) Peo. Rep. by Nat Glover D.D.A.

. . . . . .

(x) Deft. (x) Adv. of legal & const. rights.

(x) Deft. Wvd. Stat. Time for ( ) arraignment ( ) trial (x) sent (x) prob. report. (x) Info ( ) Indict.

(x) Amend by adding count 2 sec. 11357(c) HS

(x) Deft. wvd. reading, defects & advisement. (x) Amended information to be filed.

. . . . . .

(x) Court finds deft intell & voluntarily waived legal & const rights to jury trial, confront & examine witnesses and to remain silent.

(x) Deft's written wvr. of legal and const. rts. on (x) Guilty ( ) Nolo contender plea recv'd & ord filed. Court finds fact. basis & accepts plea. To (x) Amend ( ) Compl ( ) Ind ( ) Info deft. pleads (x) Guilty ( ) Nolo contendere to (x) counts 1 and 21 [sic]

. . . . . .

(x) Deft adv (x) Conseq of plea if not a citizen (x) This constitutes a prior conviction ( ) Falls within

parameters of Proposition 8 (x)
Maximum exposure 3 years (x) conseq
of violating: (x) Prob ( ) Parole

(x) Csl. joins in waivers and plea. ____

(x) Deft. ( ) Applied ( ) Wvd. prob. (x)
Req. imm. sent. ( ) Prob. rep
ordered.

. . . . . .

(x) Defendant advised if there are no
violations of law or probation for 1
year the Probation Department will be
relieved of supervision the remaining
two years

continued on page 2

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MINUTE ORDER

CASE: C-68857 PEOPLE VS. Acevedo, Charles Steven PAGE 2

(x) No legal cause why judgment should not be pronounced and deft. having (x) pled (x) guilty ( ) nolo contendere to ( ) been found guilty of 11359 HS a (x) felony ( ) misd. as chgd. in ct. 1 and 11357(c) HS a ( ) felony (x) misd. as chgd. in ct. 2. Deft. sent to state prison for ( ) low ( ) Mid ( ) Upper term of ____ years.

. . . . . .

(x) Imp. of sent. susp. & Deft. placed on prob. for 3 years. Under following terms:

(x) Be confined in OCJ for 30 days

(x) Credit for time served of 2 actual 1 conduct, totaling 3 days.

(x) Court orders stay of execution until Friday 11-11-88 at 8 PM (see below)

. . . . . .

(x) Pay restitution fine of $100.00 ( ) Purs 13976 GC ( ) Fine stayed then permanently stayed upon payment of restitution

( ) Make full restitution in amount determined by ____ through probation office ____.

. . . . . .

(x) Use no unauthorized drugs, narcotics or controlled substances, submit to drug or narcotic testing as directed by P.O. or police officer ____

(x) Submit your person, prop, including residence, premises, containers or vehicle under your control to search and seizure at any time of the day or night by any police or P.O. with or without a warrant and with or without

"

reasonable cause or reasonable suspicion.

(x) Cooperate with P.O. in plan for . . . Psychiatric (x) Drug . . .

(x) Register pursuant to ( ) 290 PC (x) 11590 H&S ( ) ____

(x) Seek training, schooling or employment and maintain residence and associations as approved by the probation department. ( ) ____

(x) Not own, use or possess any type of dangerous or deadly weapon.

(x) Obey all laws, orders, rules and regulations of the probation dept., court and jail. (x) Violate no law ( ) ____

. . . . . .

(x) Pay lab analysis of $40.00 as dir by P.O.

(x) Deft accepts terms, cond of probation. . . .

. . . . . .

(x) This minute order constitutes (x) Probation order . . .

. . . . . .

(x) Temporary commitment order forwarded to jail this date; remaining 27 days to be served by reporting to jail by 8 PM Friday to be released by 8 AM Monday commencing 11-11-88 and following that schedule until sentence has been served.

ENTERED: 10-12-88

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[Reporter's Transcript pp. 2-5]

Santa Ana, California - Friday, October 7, 1988

Morning session

(The following proceedings were had in open court:)

THE COURT: People versus Richard Brian St. George and Charles Steven Acevedo.

MR. JACOBS: Mike Jacobs for the People.

MR. ANDERSON: Fred Anderson for Mr. Acevedo.

MR. LANDGREN: Todd Langren for Mr. St. George [the co-defendant], who is present.

THE COURT: I understand this is not going to be a de novo hearing, we're going to submit it on the basis of a stipulation, are we?

MR. JACOBS: Yes, Your Honor. I've submitted points and authorities and the

factual patterns are the same, but I have in front of me the motion on Richard Brian St. George, points and authorities --

THE COURT: Slow down. Who represents St. George?

MR. LANDGREN: I do, Your Honor.

THE COURT: His points and authorities, and we're going to assume --

MR. JACOBS: No, it's mine.

THE COURT: It's yours. I'll have to look at those carefully.

MR. JACOBS: Then there's one addition, Your Honor.

THE COURT: We're talking about what pages?

MR. JACOBS: Your Honor, the facts are on page 1 and 2. There's a correction on page 2, line 3, it should be apartment number 12.

THE COURT: Are we correcting that?

MR. JACOBS: From 3 to number 12.

THE COURT: I have 807 Stevens, #12.

MR. JACOBS: That's what it should read.

THE COURT: That's what mine reads.

MR. JACOBS: All right. Then at the end of the paragraph we're going to add one sentence. That sentence would be, "At 11:45 a.m. surveilling officers saw Mr. Daza exit the residence and dropped the paper and box which had contained the cooler holding the marijuana into a trash bin."

THE COURT: Okay.

MR. JACOBS: One more sentence, Your Honor: "At that time Officer Coleman left the scene to obtain a search warrant."

THE COURT: I've written those two sentences into the presentation of facts as contained in your brief.

MR. LANDGREN: There should be some additional changes I'd like to go over with the court, with Mr. Jacobs' approval.

On line 11 of that second page of the statement of facts there's a conclusionary statement. If I may have just a moment with counsel I won't clutter up the record.

Your Honor, one [sic] line 13, the second page after the word "Morehouse," we should insert the words -- it says "stopped and detained by Officer Morehouse."

THE COURT: That's line 12 on mine.

MR. LANDGREN: Okay, I'm sorry.

After "Morehouse," it should be after he went to the complex should be substituted for the words "as he attempted to drive out of the complex."

THE COURT: That's what mine says.

MR. LANDGREN: Your's says, "as he attempted to drive out of the complex."

THE COURT: Yes. "Then stopped and detained by Officer Morehouse as he attempted to drive out of the complex."

MR. LANDGREN: The words "as he attempted to drive out of the complex" should be changed and it should read, "after he drove --" or "after he left the complex."

THE COURT: "After he left the complex"?

MR. LANDGREN: Yes, sir.

THE COURT: Okay. Anything else?

MR. LANDGREN: No, sir.

[Reporter's Transcript pp. 9-10]

THE COURT: I'm having a little trouble determining exactly what the facts are from this statement. Let's clarify what we have so we're predicating our decision on the stipulation.

We're talking about at page 2 defendant St. George was observed by Officer Andrade and Cousins exiting the residence wearing a blue knapsack. Doesn't say how they got into the knapsack. Just says he was arrested after the officers found --

MR. JACOBS: The last sentence says after he was taken into custody they searched the knapsack.

THE COURT: Said he was arrested after the officers found approximately one and a half pounds of marijuana in the knapsack. So apparently by implication there was a search of the knapsack and then an arrest. Doesn't say that here.

Is that what happened?

MR. JACOBS: Yes, we'd stipulate that's what happened.

THE COURT: Do you stipulate to that, Mr. Anderson?

MR. ANDERSON: Yes. When it doesn't affect my case I'll stipulate to anything.

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[Reporter's Transcript pp. 19-20]

[MR. LANDGREN:] The court has before it attached to the points and authorities, I believe the court has the search warrant. Did we include that in our motion?

MR. JACOBS: Yes.

MR. LANDGREN: If the court would take note of the motion.

THE COURT: That includes the affidavit for everything in the search warrant?

MR. LANDGREN: Yes, sir.

THE COURT: Mr. Anderson, are you stipulating that can be considered by the court as as factual presentation?

MR. ANDERSON: May I have just a moment, Your Honor?

Yes, I'll stipulate to that.

THE COURT: All right.

MR. JACOBS: That's fine, Your Honor.

THE COURT: Okay.

[Reporter's Trancript pp. 22-23]

MR. ANDERSON: May I insert a couple items in the statement of facts?

THE COURT: If you want to, but I wish we'd get all this together.

MR. ANDERSON: I understand, Your Honor. At line 19 --

THE COURT: Page 2?

MR. ANDERSON: On page 2 where it says "silver Honda," but not the same Honda as the search warrant. The search warrant Honda is a black Honda. This is a silver Honda.

THE COURT: Mr. Jacobs said they can detain these people if they have probable cause to detain them, and then if they learn something during the course of the search they can amplify the request for the warrant and search these people because of the information they received in the house. That would mean that it doesn't have to be named in the search

warrant on his doctrine of inevitable discovery. The question is, does the doctrine go that far? He said yes, it does. And neither one of you have responded to that.

MR. ANDERSON: Can I finish amending the facts?

THE COURT: Sure. You don't have to amend them, just stipulate that silver Honda here was not named in the search warrant.

MR. JACOBS: Why don't we stipulate the trunk was locked.

MR. ANDERSON: The trunk was locked and when they affected the stop my client's car was driving down a public street having left the area.

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[Reporter's Transcript pp. 25-26]

THE COURT: Everybody is all through?

We don't have innocent behavior to start with. We have illegal behavior to start with. We have marijuana, which is a bulks [sic] substance, we have a delivery to a house, which must be the house wherein illegal activity takes place and distribution therefrom must take place or reasonably could take place. We have two people leaving the house with things convenient for the purpose of carrying marijuana, and certainly the police had reasonable and probable cause to detain them. Then we have the car situation, which gives rise to search greater leeway when it's involving a car, and the stipulated facts include the fact that both these cars were in motion when they were stopped.

You could say well, the police let them get in motion so they could stop them

and use the broader spectrum that's involved with a car than it would if they were just walking down the street. And I don't know of any case that says they can't do that. It's like the old cases where they used to wait until the guy went in his house and arrest them in there so they could search the house. That was ruled out in Chimel, I don't know of any case that applies to cars. So they're in a car, they have reasonable cause to believe there's narcotics in the car, they stop it. You've got a car stop. And you have exigent circumstances under the cases. And I think they had reasonable cause under the cases, which you don't necessarily agree with, to search the cars without a search warrant, which they did, and obtained the narcotics.

I don't agree with Mr. Jacobs that inevitable discovery would apply in this case. But irrespective of that, I feel

they could have got a search warrant. But I don't think they had one and to search these two items, but I do find that the car stop search was legal and your motion under 1538 is denied.

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AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California

Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: 89-1690
October Term, 1990

STATE OF CALIFORNIA

Petitioner,

v.

CHARLES STEVEN ACEVEDO

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within JOINT APPENDIX as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Fred Anderson
1851 East 1st Street,
Suite 1450
Santa Ana, CA 92705

Office of the Clerk
Supreme Court of California
4250 State Building
San Francisco, CA 94102

Clerk of the Superior Court
700 Civic Center Drive West
Santa ana, CA 92701

District Attorney of
Orange Country
P.O. Box 808
Santa Ana, CA 92701

Court of Appeal
Fourt Appellate District
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Dated at San Diego, California, November 8, 1990.

Robin Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 8th day of November, 1990.

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County of San Diego
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Anne Marie Buford
Notary Public in and for said County and State

No. 89-1690 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Under the Fourth Amendment principles set forth in United States v. Ross, 456 U.S (1982) 798, is an officer who has probable cause to believe that there is contraband in a specific container within a vehicle required to obtain a search warrant for that container or may the officer search the container for the contraband without a warrant?

2. Relatedly, did this Court's opinion in United States v. Ross, supra, overrule or limit the decision in United States v. Chadwick 433 U.S. 1 (1977)?

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OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three reversing the judgment of the California Superior Court in and for the County of Orange is reported in People v. Acevedo, 216 Cal.App.3d 586, 265 Cal.Rptr. 23 (1989), and appears as Appendix A to the petition for writ of certiorari at pages A-1 through A-21.

The first order modifying the concurring opinion is also reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23, and appears as Appendix B to the petition for writ of certiorari at pages A-23 through A-25.

The first order modifying the majority opinion is also reported at 216 Cal.App.3d 586, 265 Cal.Rptr. 23, and appears as Appendix C to the petition for writ of certiorari at pages A-27 through A-28.

The second order modifying the concurring opinion is also reported at 216 Cal.App.3d 586 and 265 Cal.Rptr. 23, and appears as Appendix D to the petition for writ of certiorari at pages A-30 through A-31.

The unpublished order of the Supreme Court of California denying petitioner's petition for review on direct appeal was entered in the Official Minutes of that court and reported in the Official Advance Sheets of the California Supreme Court. The minute entry is reproduced in Appendix E to the petition for writ of certiorari at page A-33.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three, which was entered on

December 12, 1989. The California Supreme Court denied review in this case on March 15, 1990. The petition for writ of certiorari was filed within the required 60 day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 15, 1990. (Market Street Railroad Co. v. Railroad Commission, 324 U.S. 548, 550-552 (1944).) Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution. The petition for writ of certiorari was granted on October 1, 1990.

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. The Procedural History

In an information filed by the District Attorney of Orange County, California, on June 24, 1988, respondent and a co-defendant were charged with one count of possession of marijuana for sale in violation of California Health and Safety Code section 11359. (CT 2; JA 1-2.)[1/]

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1. The designation "JA" refers to the joint appendix. The designation "CT" refers to the Clerk's Transcript of the trial court's documents and orders. The designation "RT" refers to the

On this same date, respondent was arraigned in the Orange County Superior Court and entered a plea of not guilty to the charge. (CT 1.) Respondent's motions to suppress evidence and to dismiss the charges pursuant to California Penal Code sections 995 and 1538.5 were heard and denied on October 7, 1988. (CT 77; JA 19-20.)

On October 12, 1988, as part of a plea bargain, the information was amended to add a second count, charging possession of marijuana in violation of California Health and Safety Code section 11357, subdivision (c). Respondent then entered a plea of guilty to both counts. (CT 78; JA 21-27; RT 40-41.)

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reporter's transcript of the trial court proceedings. The clerk's and reporter's transcripts were both included as part of the official record before the California Court of Appeal and California Supreme Court.

On this same date, respondent was granted probation on certain terms and conditions, including 30 days in custody and a $100 fine. (CT 79; JA 21-27.)

Respondent's notice of appeal was filed on November 10, 1988. (CT 83.) In a published decision filed on December 12, 1989, the Court of Appeal, Fourth Appellate District, Division Three, reversed with directions the judgment of the Superior Court and held that the search of the paper bag violated the Fourth Amendment. (Ptn., Exh. A.) Modifications to the opinion that did not change the result were issued on December 20 and 29, 1989, and January 3, 1990. (Ptn., Exhs. B, C and D.) On March 15, 1990, the California Supreme Court denied petitioner's petition for review. (Ptn., Exh. E.)

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B. The Facts Of The Crime

On October 28, 1987, Investigator Don Coleman of the Santa Ana Police Department received a telephone call from United States Drug Enforcement Agent John McCarthy from Hawaii. Agent McCarthy informed Investigator Coleman that Agent McCarthy had seized a package containing a picnic cooler. Inside the cooler the agent had found nine clear bags of marijuana. The bags were approximately 12" by 4" by 3" and each contained about two pounds of marijuana. The package was addressed to a J.R. Daza at 805 West Stevens Avenue, Santa Ana, California. The package was to have been sent to the Federal Express Office at 700 East Alton in Santa Ana. McCarthy told Coleman that the agent would send the package to Coleman instead. The intent of the officers was to arrest the person who

picked up the marijuana. (CT 64, 71; JA 4, 13-14; RT 20.)

McCarthy sent the package to Coleman, who received it on October 29, 1987. Coleman opened the package and found the marijuana in the manner Agent McCarthy had described. Investigator Coleman repackaged the box. He then contacted Mike Cole, the Senior Operations Manager at the Federal Express Office. Coleman told Cole that Coleman wanted to leave the package at Federal Express and then arrest the person who picked it up. Cole took the package and kept it under lock. (CT 64, 71; JA 4, 14; RT 20.)

The next day, October 30, 1987, Investigator Coleman went back to the Federal Express Office. He examined the package containing marijuana. The package was still under lock. It had not been tampered with. The wrapping was the same. A small mark Coleman had placed on the

package was still there. (CT 64, 71; JA 14; RT 20.)

A telephone number, apparently on the delivery instructions from the shipper, was checked through the Santa Ana Police Department facilities and found to belong to a Jamie R. Daza at 807 West Stevens, Apartment #12 in Santa Ana. A check of Daza's California driver's license confirmed this same address. On October 30, 1987, at about 10:30 a.m., a man who identified himself as Jamie Daza went to the Federal Express Office and picked up the package. Daza placed the package into his vehicle and drove to his apartment on West Stevens. He carried the package into the apartment. (CT 64, 71; JA 5, 15-16; RT 20.)

Around 11:45 a.m., surveilling officers saw Daza exit his apartment and drop the paper and box that had contained the marijuana into a trash bin. (CT 65;

JA 5; RT 3.) At this time Investigator Coleman left the scene to get a search warrant. (CT 65; JA 5; RT 3.)

Around 12:10 p.m., co-defendant St. George was seen by officers exiting the residence wearing a blue knapsack. The knapsack appeared to be half full. Fearing the loss of evidence, the officers stopped and detained him after he had left the apartment as he tried to drive out of the complex. The knapsack was searched and 1 and 1/2 pounds of marijuana was found. (CT 65; JA 5; RT 4.)

Around 12:30 p.m., respondent arrived at the scene. He walked to apartment 12 and entered. Respondent had nothing in his hands. He exited about ten minutes later carrying a brown lunch bag that appeared to be full and of the appropriate size of the wrapped marijuana packages that Agent McCarthy had seen. Respondent was then observed to leave the apartment

and walk to a silver Honda in the parking lot. He placed the brown lunch bag into the trunk of the Honda and then attempted to leave. In order to prevent the possible loss of evidence from the apartment under surveillance, respondent's vehicle was stopped by a marked police car. The trunk was opened, as was the bag, and inside the brown bag the officers found 1/4 to 1/2 pound of marijuana. (CT 65; JA 6-7.)

The search warrant issued at 12:40 p.m. (JA 12.) Shortly thereafter Investigator Coleman returned with a search warrant. The apartment was searched and numerous bags of marijuana were found. (CT 71, 74.)

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SUMMARY OF ARGUMENT

In United States v. Ross, 456 U.S. 798, 823 (1982), the Court specifically held that under the Fourth Amendment, once probable cause exists to believe that somewhere in a vehicle there is contraband, the entire vehicle may be searched without a warrant and the

> "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (United States v. Ross, supra, at 823.)

Even closed containers found in a vehicle in such a search may be seized and searched. (Id.) However, in the case at bar, the California Court of Appeal, relying on United States v. Chadwick 433 U.S. 1 (1977), held that since the officers had particularized probable cause relating to a closed container before that container was placed into the vehicle, the officers had the right to seize the bag

but needed a search warrant to open it. Such a ruling cannot be justified in light of the Court's holding in Ross.

In Ross the Court recognized two related policy considerations were involved in every vehicle search: The inherent mobility of a vehicle, and a lesser expectation of privacy that surrounds a vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. Both of these rationales fully apply in the case at bar. When Mr. Acevedo placed the bag of drugs in the vehicle it attained the same degree of mobility as the vehicle and was in an area subject to a lesser expectation of privacy. As such, given probable cause to believe that the vehicle contained a bag and that bag contained illegal drugs, the officers could seize it and search it without a warrant. The rules promulgated

by the Court in Ross should fully cover the case at bar. No distinction should be made based on whether there was preexisting probable cause as to the container before it was placed into the vehicle.

Adoption of such a bright line rule is necessary to resolve the overly confused and complex situation now faced by police officers who are forced to determine if they have particularized or unparticularized probable cause in dealing with a container found in a lawfully stopped vehicle thought to be involved in transportation of narcotics, illegal drugs or other contraband.

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ARGUMENT

SINCE THE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THE PAPER BAG FOUND IN THE TRUNK OF RESPONDENT'S VEHICLE CONTAINED ILLEGAL DRUGS, THEY DID NOT NEED A SEARCH WARRANT TO OPEN THE BAG AND SEARCH IT

In United States v. Ross, 456 U.S. 798, 823 (1982), the Court specifically held that under the Fourth Amendment, once probable cause exists to believe that somewhere in a vehicle there is contraband, the entire vehicle may be searched without a warrant and the

> "scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (Id., at 823.)

Thus, even closed containers found in a vehicle in such a search may be seized and searched. (Id.)

No separate rule should apply simply because the probable cause centered on one of the closed containers before it was placed into the car. Once the closed

container was placed into the vehicle it attained the same degree of mobility as the vehicle itself. Additionally, by placing the bag into an area subject to a lesser expectation of privacy, respondent relinquished any expectation of privacy he had concerning the contents of the bag. The Court's decisions make clear that given the mobility of the bag in the vehicle and given the reduced expectation of privacy surrounding the vehicle, the probable cause justified a search of the bag without a warrant.

The Court has repeatedly recognized two intertwined rationales that are involved in every vehicle search: The inherent mobility of the vehicle and a lesser expectation of privacy that surrounds that vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. The development of these two

concepts dates from the earliest vehicle search cases decided by the Court. Both of these rationales existed and applied to Mr. Acevedo's vehicle and it's contents, and fully supported the warrantless search of the bag of contraband that Mr. Acevedo had placed into the trunk of his car.

A. The Inherent Mobility Associated With A Vehicle Justifies A Complete Search If There Is Probable Cause

Acknowledging an indisputable need for clarification in the law of vehicle searches, in United States v. Ross, supra, 456 U.S. 798 and California v. Carney, 471 U.S. 386 (1985), the Court traced the origins of the vehicle exception and carefully examined the basis for the exception.

In particular, the Court examined the decision in Carroll v. United States, 267 U.S. 132 (1925), and its historical background. (United States v. Ross, supra, at 804-809.) The court in Ross

found that it is consistent with the Fourth Amendment's concerns for preserving the public interests as well as the rights of the individual to allow the warrantless search of a motor vehicle, when the search is undertaken with probable cause to believe the vehicle contains that which is subject to seizure. (United States v. Ross, supra, 456 U.S. at 805; Carroll v. United States, supra, 267 U.S. at 149.)

The Court has repeatedly made it clear that the vehicle exception announced in Carroll is based in large part upon the inherent and obvious difference between an vehicle and a structure--the ability to move. In Carney, the Court recognized that a vehicle's

> "capacity to be 'quickly moved' was clearly the basis of the holding in Carroll, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception." (California v. Carney, supra, 471 U.S. at 390.)

In Chambers v. Maroney, 399 U.S. 42, 51 (1970), the Court commented on the rationale for the vehicle exception to the Fourth Amendment by noting that "the opportunity to search is fleeting since a car is readily mobile." (Id.) Later, in South Dakota v. Opperman, 428 U.S. 364, 367 (1976), the Court noted that this inherent mobility of automobiles "creates circumstances of such exigency that, as a practical necessity rigorous enforcement of the warrant requirement is impossible." (Id.) More recently, in Ross the Court held that an immediate intrusion was justified because of "the nature of an automobile in transit . . ." (United States v. Ross, supra, 456 U.S. at 806.) Finally, in Carney the Court noted that this potential for mobility generates the problem that "Absent the prompt search and seizure, [the vehicle] could have readily been moved beyond the reach of the

police." (California v. Carney, supra, 471 U.S. at 393.) Thus, the Court concluded that the vehicle exception to the Fourth Amendment's warrant requirement historically turned on the ready mobility of the vehicle and on the presence of the vehicle in a setting that objectively indicated that the vehicle was being used for transportation. (Id., at 394.)

In the case at bar, once the bag filled with contraband was placed into the automobile, it acquired the same degree of mobility as the vehicle itself. Once placed in the car, it had the same ability to be rapidly moved away from the area as much as any other item inside of or attached to the car. Indeed, it had the same exact degree of mobility as the closed brown bag found in the trunk of the defendant's vehicle in Ross. As noted by Justice Blackmun in his dissent in Arkansas v. Sanders, 442 U.S. 753, 769

(1979), "The luggage, like the automobile transporting it, is mobile." Respondent's independent and intentional action of placing the bag into the vehicle showed an intent to move the bag from its original location. His act of driving the vehicle was a demonstration of the precise mobility that justified the searches in Ross and Carroll. Given such a clear demonstration of mobility, the exigent circumstances of mobility encompassed the bag itself and no search warrant was required.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (United States v. Ross, supra, 456 U.S. at 809.)

Therefore, once Mr. Acevedo placed the paper bag into the trunk of the vehicle it attained the same degree of mobility as the vehicle itself. Like the

vehicle, it had the potential for mobility, the potential to rapidly move beyond the reach of law enforcement. Like the bag in the trunk of the vehicle in Ross, since there was probable cause to believe it contained illegal drugs, the officers did not need a warrant to search it.

B. The Lesser Expectation Of Privacy Given To A Vehicle Also Justifies The Search Of The Bag Of Illegal Drugs Found Within the Vehicle

The ability of the police to conduct a probable cause based search of a vehicle is not limited to the fact of its mobility.

The Court has also noted that since moving vehicles are "justifiably the subject of pervasive regulation by the State" there is a lesser expectation of privacy for the occupant. (New York v. Class, 475 U.S. 106, 113 (1986); California v. Carney, supra, 471 U.S. at

391.) The reduced expectation of privacy derives not so much from the fact that portions of the vehicle may be in plain view as from the pervasive regulation of vehicles by the government. (California v. Carney, supra, 471 U.S. at 392.)

In South Dakota v. Opperman, supra, 428 U.S. at 368, the Court held that this pervasive regulation of vehicles covers hundreds of aspects of the vehicle's physical structure as well as its operation. As a result of these laws, it is a common everyday occurrence that police stop and examine vehicles to ascertain compliance with the myriad of regulations. (Id.) The extent of the regulation is so great, the Court has referred to it as a "web of pervasive regulation." (New York v. Class, supra, 475 U.S. at 112.)

So well known is the regulatory scheme, that the Court has stated, "The

public is fully aware that it is accorded less privacy in its automobiles. . . ." (California v. Carney, supra, 471 U.S. at 392; accord New York v. Class, supra, 475 U.S. at 113.) Moreover, because of these regulations, individuals have always been on notice that a movable vehicle may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrates's prior evaluation of those facts. (United States v. Ross, supra, 456 U.S. at 806, fn. 8.)

Moreover, the Court has noted that given the existence of probable cause to believe a vehicle contains contraband, any expectation of privacy is even further diminished.

> "In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is

> transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." (United States v. Ross, supra, 456 U.S. at 823.)

Thus, in the case at bar, when Mr. Acevedo placed the paper bag filled with contraband into the trunk of the car, he was on notice and aware that he was placing the bag into an area involving a reduced expectation of privacy. Whatever privacy concerns he may have subjectively evidenced by placing the contraband into a bag were dissipated by his act of placing the bag into an area involving a known reduced expectation of privacy. Once the bag was placed in the car, it was subject to the rules set forth by the Court in Ross. Indeed, Mr. Acevedo's paper bag was in the same position as the paper bag in the trunk of the vehicle in Ross in respect to the key factors of mobility and privacy.

The factors of mobility and a lesser expectation of privacy both apply to the bag of illegal drugs that Mr. Acevedo had placed into his trunk. Mr. Acevedo's act of driving the vehicle was the precise mobility that justified the searches in Ross and Carroll. By placing the bag into the vehicle, Mr. Acevedo had subjected it to a lesser expectation of privacy as in Ross and Carney. Given the exigent circumstance of mobility that encompassed the bag itself and given the lesser expectations of privacy that were involved, no search warrant was required. The bag was in the same position as each of the closed containers searched in Ross.

> "The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (United States v. Ross, supra, 456 U.S. at 809.)

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C. The Rule Announced In Ross Should Apply To This Case

The Court's holding in United States v. Chadwick, 433 U.S. 1 (1977) was premised on policy determinations now rejected by the Court in vehicle search cases. As such, the interpretation of the Fourth Amendment announced in Ross should apply to the search of the closed container of drugs in this case.

The California Court of Appeal in the case at bar held that a warrant was needed for the search of the closed container based on this Court's holding in United States v. Chadwick, supra, 433 U.S. at pages 13-16. It is, of course, true that in Chadwick, this Court invalidated the search of a 200 pound footlocker that had been placed into a vehicle's trunk. However, Chadwick is readily distinguishable as it was not argued or decided as a vehicle search case. The basis of the ruling was a rejection of the

government's claim that since the footlocker itself could be moved, it always had the same inherent mobility as a motorized vehicle. (United States v. Chadwick, supra, 433 U.S. at 13.) There was no argument that the search of the footlocker was justifiable because it had been placed into a vehicle by its owners. (Id., at 11-12.) It is important to note that at the first suppression hearing in the Federal District Court in Chadwick the federal government had argued "that as the vehicle itself could have been searched without a warrant, so also could the footlocker, as part of its contents." (United States v. Chadwick, 532 F.2d 773, 778 (1st Cir. 1976).) The government did not pursue that theory upon petitioning the district court for reconsideration, before the Court of Appeals, or before this Court. Indeed, this Court specifically noted in its opinion that,

> "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search. . . ." (United States v. Chadwick, supra, 433 U.S. at 11-12.)

Thus, the result in Chadwick is distinguishable because in this case the State of California has contended from the beginning that Mr. Acevedo's act of putting the bag in the trunk of the vehicle subjected the bag to the vehicle exception to the Fourth Amendment.

Moreover, the rationale for the decision in Chadwick has been undercut by the subsequent holdings of the Court. In Chadwick, the Court's opinion turned on the expectation of privacy in the closed container and on the fact that once the government had seized the footlocker, it was unreasonable not to obtain a warrant. (Id., at 13-16.) But in Ross, the Court recognized that even if a citizen exhibited a reasonable subjective

expectation of privacy in a closed container, that expectation dissipated when the container was placed in a vehicle and there is probable cause to believe there is contraband in the container. (United States v. Ross, supra, 456 U.S. at 823: accord United States v. Johns, 469 U.S. 478, 484 (1985).) Thus, the first underpinning of Chadwick is no longer good law as to a closed container that is placed inside a vehicle, as it is based upon policy considerations now rejected by the Court.

Additionally, in recent years, the Court has repeatedly rejected the assertion that when police have probable cause to search a closed container in a vehicle, once they seize that container and take it into their possession nullifying its ability for movement, they must then obtain a warrant before opening it. (United States v. Johns, supra, 469

U.S. at 486-487; Michigan v. Thomas, 458 U.S. 259, 261 (per curiam 1982); Florida v. Meyers, 466 U.S. 380, 382 (per curiam 1984).) As the Court stated, "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." (Florida v. Meyers, supra, at 382.) Thus, the second and only remaining underpinning of Chadwick is also based on policy considerations no longer accepted by the Court. Therefore, the holding in Chadwick should have no application to the case at bar. Chadwick was not an automobile search case at all. It was never argued or decided as such. Moreover, the policy considerations supporting the decision in Chadwick have since been rejected by the Court. Thus, no aspect of the decision in

Chadwick should affect the outcome in this case.[2/]

It is not rational to make the distinction between whether a search warrant should be obtained based upon whether or not the officers had sufficient knowledge that the contraband was in a specific container in a specific part of the vehicle as opposed to being in the vehicle generally. As Professor LaFave

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2. Similarly, the Court's decision in Arkansas v. Sanders, supra, 442 U.S. 753, was premised both on Chadwick and on a finding that a suitcase, after its seizure from a vehicle but before its search, no longer had any mobility. (Id., at 762 and 763.) However, since then the Court has rejected such an analysis, holding that the essential factors are the mobility and decreased expectation of privacy at the moment of the seizure. (United States v. Ross, supra, 456 U.S. at 807 fn. 9 and 809-817; United States v. Johns, supra 478 U.S. at 487-488.) Thus, although the Court has indicated in a footnote that Sanders has survived Ross (United States v. Place, 462 U.S. 696, 701 fn. 3 (1983)), such an aside, devoid of any analysis, is not supported by a careful examination of the policy considerations in Ross in respect to vehicle searches.

has noted, such a holding would mean that police officers may actually be able to broaden their power to make warrantless searches by limiting their accumulation of probable cause. (LaFave, Search and Seizure, Second Edition, Section 7.2(d), page 58 (1987).) Indeed, even the California Court of Appeal recognized the "anomalous nature of the Ross-Chadwick dichotomy; . . . ." (People v. Acevedo, 216 Cal.App.3d 586, 592, 265 Cal.Rptr. 23 (1989).) The California court noted that it was creating an "incentive for police officers to withhold evidence related to probable cause in order to fit within the more generous confines of Ross." (Id., at 592) The purpose of the exclusionary rule is to encourage future police conformance with the dictates of the Fourth Amendment, not to reward them for creative avoidance. Yet a holding that more particularized

probable cause requires a warrant encourages such inappropriate behavior.

Such a rule not only flies in the face of logic but is also clearly contrary of the stated desire of the Court to formulate straightforward, workable rules regarding the searches of vehicles, so that police officers can make proper decisions regarding the search of vehicles. (New York v. Belton, 453 U.S. 454, 458 (1981).) The Court has held that,

> "'a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (Id., at 458, quoting Dunaway v. New York, 442 U.S. 200, 213-214 (1979).)

The need for straightforward and predictable rules is in the interest of both the police and the citizens who may be subjected to police activity. (Id., at 459-460.)

The rule formulated in Ross is clear, logical and should be applied to the situation in the case at bar. A rule requiring a warrant when there is particularized probable cause will further cloud what the Court described in Ross as "this troubled area." (United States v. Ross, supra, 456 U.S. at 817.) Instead of the straightforward rule of Ross, which looks to the overall existence of probable cause to search the vehicle and its contents, endless litigation over whether the officer knew of the location and container of the contraband will be inevitable. A far more workable rule is the holding in Ross that if

> "probable cause justifies the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." (United States v. Ross, supra, at 825.)

Such a rule establishes the exact type of "bright line" the Court has sought to

assist peace officers in their difficult tasks. Thus, the Court's earlier decision in United States v. Chadwick, supra, 433 U.S. 1, should be held to be inconsistent with and to have been overruled by Ross in situations such as the one in the case at bar.

Moreover, adherence to the Ross-Chadwick dichotomy as was attempted by the California Court of Appeal in the case at bar, creates severe difficulties for peace officers in the performance of their duties. In a situation where officers have sufficient justification to stop a vehicle for transporting narcotics or other illegal drugs in a particular container within that vehicle, what are the officers to do with the citizens while they go through the often lengthy and laborious task of obtaining a warrant? The officers could assume that since they have probable cause to believe that there

are illegal drugs in the container, they also have probable cause to arrest the driver. But such a course of action forces the officers to immediately commit themselves to a significant intrusion into a citizen's personal privacy, an arrest. In the alternative, the officers could decide to withhold the decision on the arrest until the bag is opened with the warrant. However, that course of action inherently includes a different significant intrusion into the citizen's personal privacy rights. It would require a long detention of the citizen as well as the container and the vehicle.[3] One of the problems with such a lengthy detention is that at some point the detention

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3. Of course, in Chambers v. Maroney, supra, 399 U.S. at page 52, this Court recognized that if an officer has the right to seize a vehicle and hold it while a search warrant is obtained, the officer has the right to immediately search the vehicle without a warrant as well.

becomes an arrest. (Florida v. Royer, 460 U.S. 491, 501-502 (1983).) Thus, while the officers are trying to obtain a warrant they may run the very real risk of inadvertently arresting a citizen before the contraband is actually found. Thus, the existing rule leaves the officers the Hobson's choice of doing nothing or taking action that amounts to a significant intrusion into a citizen's personal rights of privacy. Allowing the officers to search the closed container at the scene, allows a speedy resolution of the situation with only a minor intrusion in the citizen's personal privacy rights, a brief delay and a quick limited search. The holding in Ross is a far better rule. Officers can quickly resolve the situation, promptly arresting criminals while speedily allowing law abiding citizens to proceed on their way. The rule created by Chadwick-Sanders will

ensnare officers and citizens in time consuming and unnecessary waits for the procuring of warrants or in unneeded, perhaps premature arrests.

In Ross the Court recognized that delaying the opening of a container found in a vehicle raised "practical considerations" as to what to do with the vehicle itself while the search warrant was obtained. (United States v. Ross, supra, 456 U.S. at 822.) That same practical problem exists in the case at bar. If the suspected container turns out to have drugs or other contraband in it, then the vehicle itself has been used for transportation of that contraband and is seizable as well. If the officers have reason to believe a specific container in the vehicle contains contraband, it is reasonable for them to believe that a full search may turn up more than just what is in the closed container. (United States

v. Mazzone, 782 F.2d 757, 761 (7th Cir. 1986); United States v. Shepherd, 714 F.2d 316, 319-320 (4th Cir. 1983).) But if the officers decide to delay arrest until the container is opened, the police may have to hold the vehicle in some safe and appropriate manner until the warrant has been obtained, served and executed. Thus, not only will the citizens have to be detained but so will their vehicles. Moreover, the officers guarding the citizens, the officers guarding the vehicle and the officers off seeking the warrant will be unavailable for any other form of police work. As Justice Powell noted in his concurring opinion in Robbins v. California, 453 U.S. 420, 433-434 (1981),

> "Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. . . . The aggregate burden of procuring warrants

> whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." (Robbins v. California, supra, at 433-434.)

As already discussed, given the presence of the bag in the vehicle and given the existence of probable cause, there is no reasonable privacy interest involved in the search in the case at bar. Thus, given the practical considerations including the loss of scarce law enforcement resources and the storage problems created both by the detained vehicles and closed containers, the Court should not require a warrant simply because the probable cause arose before the closed container was placed into the car. The Court should hold that the rules announced in Ross govern and uphold the warrantless search of Mr. Acevedo's drug filled bag.

Failure to reject the implications of Chadwick leaves an almost imponderable task to police officers in the field confronting rapidly changing situations. An officer must decide whether he or she has unparticularized probable cause as to an entire vehicle or particularized probable cause as to a container within the vehicle. While such determinations may be the delight of seasoned appellate attorneys, police officers have neither the legal background nor the requisite time to ponder such involved and complicated questions. Given the fact that courts may reach opposite conclusions on virtually identical fact patterns (compare State v. Borotz, 654 S.W.2d 111, 113, and 115-117 (Mo. App. 1983) with United States v. Salazar, 805 F.2d 1394, 1397 (9th Cir. 1986)), how can a police officer be expected to make a proper

determination in the field as events are rapidly unfolding?

Moreover, as Justice Blackmun noted in his dissent in United States v. Chadwick, supra, 433 U.S. at page 20, requiring officers to obtain a warrant in such a situation does nothing to protect traditional "Fourth Amendment values." Since there is no question probable cause exists to believe there is contraband in a closed container, in virtually all cases a search warrant will be issued.

> "I therefore doubt that requiring the authorities to go through the formality of obtaining a warrant in this situation would have much practical effect in protecting Fourth Amendment values. [Footnote omitted.]" (United States v. Chadwick, supra, 433 U.S. at 20.)

The point is particularly true since this case involves a location where there is a sharply lower expectation of privacy. Forcing the officers to obtain a warrant would seem more of an overall detriment to

society since those officers will be unavailable for other law enforcement purposes for significant periods of time.

Since the facts of this case reveal that there was probable cause to believe that respondent's vehicle contained contraband, the rationale of Ross should apply. That decision flatly supports the validity of a search of every part of the vehicle, including any closed containers in the car. When the closed container was placed into the vehicle by the respondent, it became as moveable as the vehicle and subject to the lesser expectations of privacy surrounding cars. Thus, the exigent circumstances covering the vehicle applied to the paper lunch bag as well. Thus, the California Court of Appeal erred in failing to uphold the search of the bag without a warrant.

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D. Even If Chadwick Still Has Some Validity, The Search Of Mr. Acevedo's Vehicle Was Nevertheless Valid

Even assuming arguendo that Chadwick somehow still has some measure of validity, the warrantless search of the bag in this case was still valid. Once Mr. Acevedo placed the bag into the trunk of his vehicle and once he had commenced movement of his vehicle, the officers had probable cause to believe that Mr. Acevedo was using his vehicle to commit the felony crime of transportation of contraband. (Cal. Health & Saf. Code, § 11360.) The vehicle itself was evidence of this new crime and could be searched under Ross. Moreover, since respondent had been involved in the felony of transportation of drugs, he was going to be taken into actual custody. The vehicle would have been either seized as evidence or impounded. Following the seizure the bag would inevitably have been searched during

the inventory search lawfully conducted by the police. (Colorado v. Bertine, 479 U.S. 367, 371-376 (1987); Illinois v. Lafayette, 462 U.S. 640, 643-648 (1983); People v. Miranda, 44 Cal.3d 57, 80-82, 241 Cal.Rptr. 594, 744 P.2d 1127 (1987).) This case presents the scenario predicted by Justice Blackmun in his dissent in Chadwick.

> "But if the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been seized, taken to the agents' office, and all its contents--including the footlocker--searched without a warrant. [Footnote omitted.]" (United States v. Chadwick, supra, 433 U.S. at 22-23.)

The problem with utilizing such a limited formulation for future cases is that it unnecessarily puts both police and innocent bystanders at risk because it delays the ability of the police to react until criminals have been given a means and an actual opportunity to begin to flee

in a vehicle. Such a situation encourages attempts to evade arrest and will often lead to high speed chases, horribly dangerous to all participants. (Id., at 24, fn. 6.) To avoid such a life threatening result, the Court should hold that the act of placing the closed container into the car, under circumstances making it appear that the vehicle is about to be driven off, gives rise to probable cause to believe the vehicle is being used for transportation of contraband. At that point, the vehicle itself becomes evidence of the crime and can be seized and searched as discussed above.

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CONCLUSION

The Court should adopt a bright line rule that will finally put to rest nearly 65 years of litigation involving the search of vehicles. If there is probable cause to believe there is contraband in a vehicle, or probable cause to believe that there is contraband in a particular container within a vehicle, then a search without a warrant is proper. The two controlling principles the Court has identified as being involved in every vehicle search were fully present for the search of Mr. Acevedo's vehicle: The mobility of the vehicle and its contents and the diminished expectation of privacy surrounding a vehicle. The mere fact that the probable cause centered only on one closed container before it went into the car does not diminish the scope and effect of either of these key variables.

The Court should hold that the Fourth Amendment principles it set forth in Ross and Carney govern the search of the car in the case at bar and no search warrant was required. Such a bright line rule will give needed guidance to police officers in the performance of their law enforcement functions and at the same time protect individual rights.

For the foregoing reasons, the judgment of the California Court of Appeal, Fourth Appellate District, Division Three, should be reversed.

DATED: November 8, 1990.

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No: 89-1690
October Term, 1990

STATE OF CALIFORNIA

Petitioner,

v.

CHARLES STEVEN ACEVEDO

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Fred Anderson
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 8th day of November, 1990.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 8, 1990.

Robin Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 8th day of November, 1990.

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

Anne Marie Buford
Notary Public in and for said County and State

QUESTIONS PRESENTED

1. Whether or not there was probable cause for the seizure of the container.

2. Whether or not under the Fourth Amendment, an officer who has probable cause to believe that there is contraband in a specific container within a vehicle is required to obtain a search warrant for that container?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1690

CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondent's position is that Petitioner's statement of the case is accurate except that the following language is not supported by any fact in the record below:

> ". . . and of the approximate size of the wrapped marijuana packages that Agent McCarthy had seen." (Petitioner's Brief on the Merits, p. 10)

If this language is stricken, Respondent accepts Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The California Court of Appeal found that there was probable cause for a warrantless search of the trunk and the seizure of the brown paper bag under the automobile exception to the Fourth Amendment. [*People v. Acevedo*,

216 Cal. App. 3d 586, 590 (1989)] However, the Court of Appeal misinterpreted the facts. Thus, the Court arrives at the erroneous conclusion that the brown paper bag in Acevedo's hand when he emerged from the apartment "approximated the size of the wrapped packages Officers knew contained marijuana" (*Ibid.*) Since the packages seen by Officer Coleman were approximately 12 inches by 4 inches by 3 inches and weighed approximately 2 pounds, they could not be the same size as the package carried by Acevedo which weighed between one-quarter and one-half pound. The Court of Appeal comes to another erroneous conclusion that ". . . the occupant of the apartment was not in . . ." (*Ibid.*). Again, the record below clearly indicates that the occupant, J. R. Daza, was in the apartment. Without these erroneous conclusions it is clear that probable cause did not exist to believe that the brown paper bag carried by Acevedo as he exited apartment 12 contained marijuana.

If there was probable cause to believe the bag carried by Acevedo as he exited apartment 12 contained marijuana, the California Court of Appeal had no difficulty in stating a Bright Line Rule explaining this exception to the Fourth Amendment as follows:

> If Police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located *somewhere* in an automobile, officers may conduct a warrantless search of any container in the car that could reasonably conceal the evidence (*People v. Acevedo*, 216 Cal. App. 3d 586, 591).

Carroll v. United States, 267 U.S. 132 (1925) does not allow all trunk searches without a warrant.

> This is to say that the facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. (*Id.* at 162.)

This Court in *Carroll* found probable cause to search the vehicle in its entirety. *Carroll* did not address a closed container within the vehicle or a closed container within a locked compartment of the vehicle.

A person has an expectation of privacy in any closed container. Once that closed container is placed in an automobile his expectation of privacy is not diminished. Furthermore. when that package is placed in a locked trunk of his vehicle his expectation of privacy is greater. A well educated police force will have no difficulty in determining when probable cause exists to search a container within the trunk of an automobile and law enforcement will suffer no detriment.

Once a vehicle is immobilized, any exigency ceases in most cases.

United States v. Chadwick, 433 U.S. 1 (1977) and *United States v. Ross*, 456 U.S. 798 (1982) are compatible and need not be overruled. This court specifically stated that probable cause existed for the search of the entire vehicle in *Ross* as opposed to a specific container within the vehicle. In *Chadwick* the Court's focus was directed towards a specific package which was placed in the trunk of a vehicle. The crystal clear meaning of the status of the existing law is as follows:

1. Where police have probable cause to believe that a container holds contraband,

2. They may seize it, and

3. Obtain a search warrant, or

4. If an exigent circumstance exists, they may examine the contents without a search warrant.

5. The fact that the container was in a vehicle as in *Ross* is of no significance and does not create an exigent circumstance.

ARGUMENT

I. THERE WAS NOT PROBABLE CAUSE TO BELIEVE THE BAG AND ITS CONTENTS CONTAINED CONTRABAND

Rule 24.1(a) of the Rules of the Supreme Court of the United States states "At its option, however, the Court may consider *a plain error* not among the questions presented but evident from the record and otherwise within its jurisdiction to decide" thus allowing this Court to decide this issue.

In the case pending before this court, respondent has asserted at the trial court level as well as the appellate court level, that there was no probable cause to search the container.

The California Court of Appeal reaches the conclusion that there was probable cause to search the bag without analysis or discussion. The Court of Appeal merely states:

> Here, however, there was more than a fair probability Acevedo was involved in dealing drugs and carrying marijuana in the lunch bag. (Citations omitted.) Although the occupant of the apartment was not in, an empty-handed Acevedo entered within two hours of the arrival of a sizeable quantity of contraband and emerged with something in a brown paper bag which approximated the size of the wrapped packages officers knew contained marijuana. Accordingly, there was probable cause for a warrantless search of the trunk and seizure of the brown bag under the automobile exception to the Fourth Amendment. [*People v. Acevedo*, 216 Cal. App. 3d 586, 590 (1989)].

However, just prior to Acevedo, entering the residence, the facts indicate that the residence contained approxi-

mately 18 pounds of marijuana which arrived in a picnic cooler containing nine plastic bags approximately 12″ by 4″ by 3″.

Approximately 45 minutes after it was known that the marijuana was in the dwelling, Acevedo arrived empty-handed, stayed for approximately ten minutes, and left with a lunch bag that appeared to be full. He then proceeded to his car, placed the bag in the locked trunk and drove away. Respondent takes issue with the Statement of Facts proffered by Petitioner in only one aspect. Although the California Court of Appeal states in its opinion that "Acevedo . . . emerged with something in a brown paper bag which approximated the size of the wrapped packages officers knew contained marijuana", (*Ibid.*) there is nothing in the record before this court or the courts below to support that conclusion. Furthermore, the record is clear that the bags seen by Officer Coleman were approximately 12″ x 4″ x 3″ and weighed approximately two pounds each. Most countries, except the United States, use the metric system. Two pounds is just short of one kilo. A kilo is a common packaging method in metric countries for many products, including narcotics. The facts are that the amount of contraband seized from the Respondent was one-quarter to one-half pound. One quarter to one-half pound would not occupy the same space as two pounds. It is clear that while the lunch bag Acevedo carried as he exited the apartment may have been full, it was clearly not the same size as the package seen by Officer Coleman of the Santa Ana Police Department. Therefore, the Court of Appeal has no basis for its conclusion that the "brown paper bag . . . approximated the size of the wrapped packages" (*Ibid.*) in the box picked up by J.R. Daza.

Absent that fact, an individual entered a dwelling at approximately 12:30 p.m. and left 10 minutes later with a full lunch bag. It is not uncommon for a person to carry his lunch in a bag. It is also not uncommon for a person to eat lunch around noon. It is not uncommon

for one to go home, pick up his lunch and return to work. From the record, J.R. Daza was a resident of this dwelling and at home at 11:45 a.m. despite the Court of Appeal statement that "Although the occupant of the apartment was not in, an empty-handed Acevedo entered within two hours of the arrival of a sizeable quantity of contraband . . ." (*Ibid.*). The record below would lead a reasonable man to believe that J.R. Daza was still in the apartment when Respondent arrived and departed. The record is void of any evidence as to whether or not Acevedo may or may not have been a resident of 807 West Stevens, Apartment 12, Santa Ana, California. Furthermore, there is no evidence in the record that Acevedo had any connection with J.R. Daza. For all we know Acevedo was Daza's son, brother, partner, roommate, employer, employee or any number of other relationships. Even though the police knew there was marijuana present, there is no evidence that Acevedo knew marijuana was present. Acevedo's intentions could have been to pick up his own lunch, a package of unknown contents for some friend, some Tupperware his wife had ordered from Daza, or any number of legal items.

It might be analogized to contraband being delivered to my house and 45 minutes later the Attorney General arrives to pick up my brief. I gladly give it to him in an envelope. At that point, has the Attorney General, while leaving my house, subjected that sealed brown paper package to its search and/or seizure? Clearly, in this case there is insufficient probable cause for the seizure of the bag and its contents.

II. WHEN THERE IS PROBABLE CAUSE TO BELIEVE THAT CONTRABAND IS IN A SPECIFIC CONTAINER WHICH IS SUBSEQUENTLY PLACED IN THE LOCKED TRUNK OF AN AUTOMOBILE AND THE AUTOMOBILE IS SUBSEQUENTLY DRIVEN AWAY THE VEHICLE MAY BE STOPPED, THE CONTAINER SEIZED, BUT A SEARCH WARRANT IS REQUIRED PRIOR TO SEARCHING THE CONTAINER

A. If There Is Probable Cause to Believe That the Bag Contains Contraband, the Authorities May Not Search the Bag Without a Warrant

There is no probable cause to believe the vehicle contained contraband other than that which is in the bag. The factor that distinguishes this case from *United States v. Ross*, 456 U.S. 798, 823 (1982) is that in *Ross* the police had probable cause to believe that the vehicle *and* the trunk of the vehicle specifically contained narcotics. Here, as in *United States v. Chadwick*, 433 U.S. 1 (1977), the only connection the contraband has with the vehicle is the fact that the container carrying it was placed into the trunk of the vehicle. There was no informant who said, "Acevedo is selling marijuana from the trunk of his car".

The California Court of Appeal correctly states the current status of the case law explaining this exception to the Fourth Amendment.

> Where, prior to a search, officers have probable cause to believe that a specific closed container holds contraband . . ., they must obtain a search warrant before opening it, even though it is located in an automobile. [*People v. Acevedo*, 216 Cal. App. 3d 586, 592, Quoting from *United States v. Salazar*, 805 F.2d 1384, 1397 (9th Cir. 1986).]

It has been demonstrated to this Court that it is possible to obtain a search warrant in less than one hour. (*California v. Carney*, 471 U.S. 386, 404 Footnote 16.)

In prior decisions this Court spent much time balancing the individual's right to privacy against the society's right for the prevention of crime and the apprehension of criminals. Certainly no one could argue with the laudable efforts of the police departments in seizing drugs and arresting criminals. However, the framers of the Constitution recognized that even though it is desirable to apprehend criminals, it is more desirable that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" be protected. It is difficult to see how the People of the State of California can be prejudiced, absent an exigency, by the delay of one hour in the obtaining of a search warrant for the paper bag when weighed against the intrusion into an individual's private papers in complete disregard of the Fourth Amendment.

B. The Bright Line Rule Which Petitioner Urges Should Be "If Police Have Probable Cause to Believe Contraband Is Concealed In a Particular Container, They Must Obtain a Warrant Before Searching It, Even When It Is Being Stored in a Vehicle"

Petitioner argues for a Bright Line Rule in order to facilitate law enforcement objectives. Respondent certainly does not argue with Petitioner's request for a Bright Line Rule, only as to where that bright line should be drawn.

The Court of Appeal had no difficulty in stating a Bright Line Rule by stating that:

> IF POLICE HAVE PROBABLE CAUSE TO BELIEVE CONTRABAND IS CONCEALED IN A PARTICULAR CONTAINER, THEY MUST OBTAIN A WARRANT BEFORE SEARCHING IT, EVEN WHEN IT IS BEING STORED IN A VEHICLE. If the investigation has, for whatever reason, yet to focus on a particular container and there is only probable cause to believe the contraband is located *somewhere* in an automobile, officers may conduct a warrantless search of any container in the car that could reasonably conceal the evidence. [*People v. Acevedo*, 216 Cal. App. 3d 586, 591. (Emphasis added.)]

That line is certainly bright. Petitioner does not want a Bright Line Rule; Petitioner wants the abolition of the Fourth Amendment as it relates to automobiles.

The Attorney General would have us believe that if the Court adopts their Bright Line Rule, the police will be better able to follow it. However, the plain and simple fact is that no matter how bright a line is drawn, the police will only follow it when it is convenient for them. Any liberal expansion of the authorities' right to search an individual's person, house, papers or effects will only lead to the emasculation of the Fourth Amendment. There is no legitimate reason why the police can not obtain a warrant to search any closed container within a motor vehicle.

Search warrants may be filled out merely by checking the boxes. The Affidavit in support of the search warrant would take substantially longer than the actual search warrant to complete. However, the affidavit merely states the reasons why the investigatory agency feels they have sufficient cause for the issuance of a warrant. In the stop of a motor vehicle, it would only be necessary for the officers, after they have identified themselves and any expertise which will qualify them to render an opinion, to merely state the reasons why they believe the locked compartments of a vehicle contain contraband. The reviewing magistrate either agrees with and issues the search warrant, or disagrees with the officers and refuses to issue the search warrant. In either case, it is a relatively simple matter requiring less than one hour. There is no requirement that Affidavits in Support of Search Warrants be typed or writ-

ten on any special paper. Furthermore, California authorizes the issuance of a telephonic search warrant whereby the officer can contact a magistrate by telephone, advise him of the probable cause he has for the issuance of the search warrant and receive the approval or disapproval from the Judge verbally. The Judge then authorizes the officer to affix his name to the warrant and proceed to search the area requested. (California Penal Code 1528(b).) With the incredibly sophisticated telecommunications currently available in the United States, it is difficult to conceive of a situation where virtually instantaneous contact cannot be made with a magistrate.

C. *Carroll* Does Not Allow All Trunk Searches Without a Search Warrant

Petitioner relies heavily on *Carroll v. United States*, 267 U.S. 132 (1925), but its reliance is misplaced. In *Carroll* the facts clearly state that the officers had specific knowledge of these individuals because they had attempted to buy bootlegged liquor from them two months earlier. They were familiar with the car and they were familiar with the corridor of transport, specifically the main highway from Detroit to Grand Rapids. Approximately two months earlier they had even followed the car from Grand Rapids to East Lansing (a distance in excess of 50 miles) but lost the vehicle somewhere in East Lansing. When the vehicle was stopped on the 15th of December, 1921, the officers

> Raised up the back of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there/ and I took out two bottles and found out it was liquor; satisfied it was liquor. (*Id.* at 172.)

At this point the officers knew what was in the seats was not the Oldsmobile stuffing, but bottles of bootlegged liquor.

> This is to say that the facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. (*Id.* at 162.)

This Court in *Carroll* found probable cause to search the vehicle in its entirety. *Carroll* did not address a closed container within the vehicle or a closed container within a locked compartment of the vehicle.

Under those facts Respondent does not argue that the police could not search the vehicle. Respondent further would have no quarrel with a search of the bag had the contents been capable of determination by the feel of the bag or its smell. Neither of these factors are present in the case at bar and the failure of proof must be resolved in Respondent's favor. All these issues are issues that a magistrate would properly assess when presented with the request for the issuance of a search warrant.

D. A Person Does Not Abandon Any Privacy Interest in a Package Placed in the Locked Trunk of an Automobile

Does Respondent have a lesser expectation of privacy when he places the bag in the locked trunk of his vehicle, or does he have a greater expectation of privacy? The bag is just as mobile in the hands of an individual as it is inside of the car. Granted a car can move it farther and faster than an individual in certain circumstances, but the distance, and speed with which the bag can be moved, is of no great consequence.

It is ridiculous to assert that luggage may maintain a high degree of expectation of privacy yet when that

luggage is placed into the trunk of a vehicle the expectation of privacy is diminished. This doesn't follow.

It could be argued that when one puts a package in the passenger compartment of an automobile, their level of expectation of privacy is not increased since the article is still capable of being seen from the outside and it is only slightly more secure than if one is walking down the street carrying the article in his hands. But the expectation of privacy is not diminished either. On the other hand, when a person puts an article in the trunk of his vehicle, common sense dictates that one's expectation of privacy is greater. Furthermore, the locking of the trunk, or the placing of the item in a trunk which locks each time it is closed, further reinforces the conclusion that the person has a greater expectation of privacy in the item.

Clearly, the Respondent in this case could have placed the bag on the seat of his vehicle. However, the Respondent knowing full well the contents of the bag was contraband, put it in the trunk of his vehicle expecting the trunk to have a greater degree of security than the passenger compartment. Furthermore, the trunk was locked. One could certainly argue that the concealing of the liquor in the *Carroll* case in the upholstery of the vehicle created a higher degree of expectation of privacy. However, the mere feeling of the upholstery disclosed the contents and provides for a sufficient distinction between the case at bar and *Carroll*.

Were Acevedo's expectations legitimate? Since the package contained contraband, could Acevedo have a legitimate expectation of privacy? To test the legality of the expectation on the item found begs the question.

E. The Authority To Search the Package in the Trunk of the Car Should Not Turn on Whether or Not the Individual Is Arrested

The Court is further urged that individuals will be unreasonably detained and may suffer defacto arrests while the officer is awaiting the issuance of a search warrant. While, it is true that officers are not judges, they do receive training. The training should consist of the ability to determine when probable cause for a search exists. When officers become adequately trained to arrest people, then they should be adequately trained when to determine whether or not probable cause exists to obtain a search warrant. The officers then will not present Affidavits in Support of the Issuance of a Search Warrant when they do not have probable cause. Furthermore, once they determine that they do not have probable cause for the issuance of a search warrant, they will release the suspect and his vehicle to travel about the highways and byways of the United States as they should. On the other hand, if the officer determines that he has probable cause for the issuance of a warrant he will, rightly, detain the individual and his vehicle until such time as he obtains a search warrant. The individual can always consent to a search if his need for immediate mobility exceeds his desire for privacy. Naturally, there will be situations where the officer believed that he had probable cause, but the magistrate is not of the same opinion. In these few cases, citizens will be restrained from their freedom and their vehicles will be similarly restrained until the magistrate instructs the officer that probable cause does not in fact exist. One can hardly imagine this happening very often with a well-trained police force. Certainly, no one wants a police force operating that is not well trained. It is not an unreasonable burden to require that the police departments adequately train their personnel to determine when probable cause exists for the issuance of a search warrant.

The solution lies not in drawing clear lines, but in educating the police officers. This writer has met few, if any, police investigators, who did not know the intricacies of search and seizure laws, as well as the authors of most treatises.

F. Once a Vehicle Is Immobilized, Any Exigency Ceases

The fact that a car is mobile should not exempt it from the requirements of the Fourth Amendment. A car can be immobilized almost instantaneously. The argument that the citizen is deprived of his vehicle while the warrant is obtained, is an interesting fictionalized method of bootstrapping. In other words, the argument is that we should allow the police to search the suspect's vehicle without a warrant, because to obtain a warrant we would unreasonably inconvenience innocent citizens. That argument is without merit. An officer should not search the vehicle unless he has probable cause to believe the vehicle contains contraband or evidence needed in the prosecution of a crime. If he has such probable cause, then he must obtain a warrant. If he does not have the probable cause, the court must not allow him to willy-nilly search any vehicle just because he wants to. In other words, the officers will not be requesting searches of vehicles of innocent citizens. They will only be requesting searches of suspects of criminal activity when they have probable cause to believe that the area searched contains contraband or evidence. Therefore, no innocent citizens will be inconvenienced while the police obtain warrants. All individuals rights will be protected because the police will consciously evaluate all situations involving the searches of locked compartments of vehicles and closed containers within trunks and will request a search warrant only of those which they have determined probable cause exists for the issuance of a search warrant. Therefore, instead of citizens being subjected to unreasonable delays, all citizens' rights will be protected by proper police investiga-

tion. In the rare case that an officer's opinion of probable cause does not match the magistrate's opinion of probable cause, the warrant will not be issued. However, one can hardly say that the citizen/suspect has had his vehicle unreasonably detained. Quite the contrary, his vehicle was being reasonably detained, and his rights were being reasonably protected by the officer seeking authority from the court required by the Fourth Amendment to search the vehicle. When the magistrate does not agree with the officer, the law has been complied with, and the citizen is free to leave with his vehicle and whatever it contains free from the unreasonable intrusion of the police authorities into his personal effects.

From the foregoing analysis, it is clear that the police do not seek to search a vehicle without a warrant either to protect its citizens or to minimize the citizen's inconvenience. They seek to search citizen's vehicles for their own convenience and for the sole purpose of gathering evidence to either bolster an arrest or to effect an arrest in the first place.

The fact that an automobile is easily moved from place to place does not present a problem. As easy as it is to move an automobile, it is just as easy for the police to take possession of the vehicle and secure it while they obtain a search warant. There is no legitimate reason why the search of a vehicle should be any broader than the search of a residence. In fact, it is much easier to take possession and control of an automobile than it is to secure a residence while awaiting the issuance of a search warrant.

It is clearly more inconvenient to the occupants of a house to secure it for the purposes of obtaining a search warrant than it is to the occupants of a car to secure it for the purposes of obtaining a search warrant.

III. IT IS NOT NECESSARY TO OVERRULE *CHADWICK* OR *ROSS*

The Attorney General would like this court to overrule *Chadwick* because "the rationale for the decision in *Chadwick* has been undercut by the subsequent holdings of the court." (Petitioner's Brief on the Merits at p. 29) The Attorney General fails to recognize the Courts statement that;

> an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the *vehicle* is transporting contraband. [*United States v. Ross*, 456 U.S. 798, 823 (1982) (emphasis added)]

Again, the Court is specific in the emphasis that probable cause must exist to believe the *vehicle* contains contraband as opposed to the container within the vehicle.

The Petitioner's reliance on *United States v. Johns*, 469 U.S. 478 (1985) is equally misplaced. Petitioner fails to see the factual distinction.

> "As he and the other officer walked towards the trucks, they smelled the odor of marijuana. They saw in the back of the trucks packages wrapped in dark green plastic and sealed with tape. Based on their prior experience, the officers knew that smuggled marijuana is commonly packaged in this manner." (*Id.* at 480.)

All these observations occurred outside the vehicle. Thus, when the officers were at the vehicles they had probable cause to search the vehicle *and* the contents.

Whether or not *Chadwick* can be considered an automobile search case or not is of no consequence. The only relevant factual difference between *Chadwick* and this case is the fact that Acevedo drove away from the point at which the package was placed in the trunk and Chadwick did not. The Court notes that;

> The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes. *United States v. Chadwick*, 433 U.S. 1, 11 (1977).

Although the Government did not argue the case as an automobile search, they analogized it to a motor vehicle for Fourth Amendment purposes and the Court discussed it as though it was a motor vehicle search case.

The Court specifically rejected the Government's argument of dimished expectation of privacy, stating;

> The factors which diminish the privacy aspects of an automobile do not apply to respondents footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile. (*Id.* at 13.)

The contents of the paper bag here were not open to public view, paper bags are not subject to regular inspection and official scrutiny on a continuing basis, and paper bags are becoming a more common repository of personal effects as our nation is plunged deeper into a recession.

Ross recognizes that the paper bag is no less worthy than the luggage in *Chadwick*.

> This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins v. California*, 453 U.S. 420 (1981) was that a con-

> stitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case. [*United States v. Ross*, 456 U.S. 798, 822 (1982)]

Clearly, here probable cause did not exist for the search of the vehicle as in *Ross* but, if at all, only for the brown paper bag. Therefore, the warrant excused in *Ross* does not apply here.

The Attorney General's second prong of attack on *Chadwick* begs the question because the officers could have searched the containers *without* a warrant at the scene in *United States v. Johns*, 469 U.S. 478 (1985), *Michigan v. Thomas*, 458 U.S. 259 (per curiam 1982) and *Florida v. Meyers*, 460 U.S. 380 (per curiam 1984). The question presented in those cases was whether or not the container search requires a warrant when the search is conducted at a later time.

Furthermore, *Johns* recognizes and tacitly affirms the principles of *Chadwick* stating;

> In *Chadwick*, police officers had probable cause to believe that a footlocker contained contraband. As soon as the footlocker was placed in the trunk of an automobile, the officers seized the footlocker and later searched it without obtaining a warrant. The Court in *Chadwick* refused to hold that probable cause generally supports the warrantless search of luggage.

> 433 U.S. at 11-13. *Chadwick*, however, did not involve the exception to the warrant requirement recognized in *Carroll v. United States*, *supra*, because the police had no probable cause to believe that the automobile, as contrasted to the footlocker, contained contraband. See 433 U.S., at 11-12. This point is underscored by our decision in *Ross*, which held that nothwithstanding *Chadwick* police officers may conduct a warrantless search of containers discovered in the course of a lawful vehicle search. See 456 U.S., at 810-814. Given our conclusion that the Customs officers had probable cause to believe that the pickup trucks contained contraband, *Chadwick* is simply inapposite. [*United States v. Johns*, 469 U.S. 478, 482 (1985)]

Petitioner further asserts that footnote 3 in the opinion by Justice O'Connor is "devoid of any analysis, is not supported by a careful examination of the policy considerations in *Ross* in respect to vehicle searches." (Petitioner's Brief on the Merits at p. 32, footnote 2)

Justice O'Connor clearly sets forth procedures for the police and the rights of the owner of a container stating;

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. [*United States v. Place*, 462 U.S. 696, 701 (1983)]

The court footnoted that analysis stating

> In *Arkansas v. Sanders*, 422 U.S. 753, 761 (1978) the Court explained: "The police acted properly—indeed commendably—in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana . . . Having probable cause to believe that contraband was being driven away in the taxi, the

police were justified in stopping the vehicle . . . and seizing the suitcase they suspected contained contraband." 422 U.S., at 761.

The Court went on to hold that the police violated the Fourth Amendment in immediately searching the luggage rather than first obtaining a warrant authorizing the search. *Id.*, at 766. That holding was not affected by our recent decision in *United States v. Ross*, 456 U.S. 798, 824 (1982). (*Id.*)

The crystal clear meaning of this well reasoned opinion is that:

1. Where police have probable cause to believe that a container holds contraband,
2. they may seize it, and
3. obtain a search warrant, or
4. if an exigent circumstance exists they may examine the contents without a search warrant.
5. The fact that the container was in a vehicle as in *Ross* is of no significance and does not create an exigent circumstance.

Justice Crosby stated;

> If police have probable cause to believe contraband is concealed in a particular container, they must obtain a warrant before searching it, even when it is being stored in a vehicle. (*People v. Acevedo*, 216 Cal. App. 3d 586, 592.)

LaFave points out in his treatise on the Fourth Amendment,

> What this means is that if there is only probable cause to search a particular container in the vehicle but not probable cause to search the vehicle generally, as was true in those cases, *Ross* does not control and (subject to the possible exceptions noted later) a warrant will be required to search the container but not to seize it. (La Fave, *Search & Seizure*, Second Edition, Section 7.2(d) page 56 (1987)]

LaFave further states ". . . it is important to stress that the Court did not overturn the *Chadwick-Sanders* rule." (*Ibid.*)

CONCLUSION

The police officers are authorized to carry firearms, effect arrests which deprive citizens of their freedom. It is respectfully requested that this Court retain the minimum standard required by the Fourth Amendment interpreted by all the existing case law requiring police to obtain a search warrant to search the container in the locked trunk of a vehicle when they have particular probable cause to believe it contains contraband.

For the reasons set forth above, it is respectfully requested that this Court affirm the decision of the Court of Appeal of the State of California.

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No. 89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

REPLY BRIEF

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ARGUMENT

I

THERE WAS ABUNDANT PROBABLE CAUSE TO BELIEVE THAT THE PAPER BAG IN MR. ACEVEDO'S POSSESSION CONTAINED ILLEGAL DRUGS

Respondent claims that the police officers lacked probable cause to believe that the bag he obtained inside the apartment and carried outside contained illegal drugs. (Respondent's Brief, Section I.) The contention can only be made by failing to consider the totality of the information known to the officers.

Relying on Rule 24.1(a) of the Rules of the Supreme Court, respondent seeks to have this Court evaluate the determination of the California Court of Appeal that under the totality of the circumstances the officer had probable cause to believe that the bag he carried from the apartment contained contraband. While this Court has the power to reach such an issue

(United States v. New York Telephone Co., 434 U.S. 159, 166 fn. 8 (1977)), the Court should exercise its discretion and not reach the question. The Court has made it plain that it will "decline to entertain" questions presented by a respondent "in the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari" or where there is no "strong suggestion of an abuse" of trial court discretion. (United States v. Nobles, 422 U.S. 225, 241-242, fn. 16 (1975).) The issue presented by respondent, the determination of whether probable cause existed under a particular set of facts, is hardly of sufficient general importance to justify an independent grant of certiorari. Additionally, the record does not provide any strong suggestion of an abuse of discretion by either the trial court or the California Court of Appeal.

This Court has also recognized that another basis for a deciding not to entertain a new issue raised by a respondent occurs when the issue was not presented below. (Heckler v. Campbell, 461 U.S. 458, 468-469, fn. 12 (1983).) In this respect it should be noted that respondent never raised his belatedly resurrected issue in a petition for review to the California Supreme Court (although Rule 28(e)(5) of the California Rules of Court allows for the filing of such a cross petition) and did not raise it in a cross petition to this Court. On this ground as well the Court should exercise its discretion and decide not to hear this issue.

But assuming arguendo that the Court decides to consider the issue on the merits, petitioner submits that considering the totality of the circumstances, the California Court of

Appeal correctly concluded that there was abundant probable cause for the officers to believe that the bag Mr. Acevedo carried from the apartment contained illegal drugs.

In this case the officers knew as an absolute certainty that nine bags of marijuana had been taken into the apartment. (JA 4, 13-14.) When Mr. Daza exited the apartment and threw away the inner and outer wrapping materials, the officers knew for a fact that Mr. Daza had unpacked the illegal drugs. (JA 6.) Twenty five minutes later when the officers saw co-defendant Mr. St. George leaving, carrying something in his back pack, the officers could reasonably believe that he was leaving with part of the illegal drugs. When the officers stopped and searched his knapsack and found part of the load of marijuana (JA 6-7), it was clear that the marijuana in the

apartment was being subdivided and was being distributed. Moreover, since Mr. St. George did not have all of the illegal substance, the officers knew as a certainty that there was still more marijuana in the apartment.

Minutes later when Mr. Acevedo arrived empty handed, stayed only briefly and then left with a filled bag, it was reasonable for the officers, viewing the totality of the circumstances, to believe Mr. Acevedo, like co-defendant Mr. St. George, was also leaving with more of the illegal contraband.

In Carroll v. United States, 267 U.S. 132, 162 (1925), this Court held that probable cause to search a location exists when the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information were sufficient to warrant a man of reasonable caution in the belief

that the location contained illegal contraband. This Court has emphasized that in testing probable cause a "totality of the circumstances" test should be applied to the "practical, nontechnical conception" of probable cause. (Illinois v. Gates, 462 U.S. 213, 230-232 (1983).) Probable cause is "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." (Id., at 232.)

In the case at bar, respondent totally ignores these principles and simply isolates his actions with the paper bag without regard for the full factual context in which they occurred. The argument ignores the police officers' knowledge of the recent arrival of the bags of illegal drugs in the apartment and the activities of co-defendant

Mr. St. George minutes earlier. When the entire factual context is considered, it is abundantly clear that both of the lower courts properly concluded that the police officers had probable cause to believe Mr. Acevedo had illegal drugs in the paper bag.

In the course of his argument, respondent tries to create two red herring issues. The long discussion as to whether or not the full paper bag was of the same shape as the bricks of marijuana taken into the apartment is beside the point.[1] The fact remains that Mr. Acevedo exited with a full paper bag that likely contained part of the drugs that were known to be in the apartment. The fact

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1. Such a factual finding by the California Court of Appeal appears to have been based upon its examination of the bag seized from Mr. Acevedo and introduced at his preliminary hearing. However, the specific source of its conclusion is not made clear in the record.

that Mr. St. George was found leaving with part of the drugs indicates the drug dealers were breaking the load apart and distributing it. Whether Mr. Acevedo's bag was the same shape as the bags of marijuana is not crucial. The central point is that the totality of the circumstances supported a reasonable belief that the bag contained part of the illegal cache of drugs. Given his conduct, the conduct of Mr. St. George and the other information possessed by the officers, there was abundant probable cause to believe that the bag contained more of the illegal drugs that were in the process of being broken up and distributed.

Respondent's discussion of whether or nor Daza returned to the apartment after throwing out the inner and outer wrapping paper (see JA 5) is simply irrelevant. The central point is that Mr. Acevedo

entered the apartment empty handed and exited minutes later with a full bag, under circumstances where there was probable cause to believe the bag contained more of the illegal contraband.[2/] Mr. Daza's presence or absence does not add or detract in any way from the probable cause matrix.

Therefore, since the issue presented by respondent was not raised in a cross petition for certiorari and since it does not present an issue of sufficient general importance to justify an independent grant of certiorari, this Court should decline to reach the question. But assuming arguendo this Court decides to consider the issue on its merits, a full and fair

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2. The hypothetical posed by respondent (see last paragraph of Section I, in Respondent's brief) is inappropriate to the case at bar because it involves the carrying of a thin flat envelope that could not have contained contraband known to be in the house. (United States v. Johns, 469 U.S. 484, 487 (1985).)

reading of the record shows an abundance of facts giving the police officers probable cause to believe that Mr. Acevedo's full bag contained part of the marijuana from the apartment. Respondent's argument to the contrary can only be made by ignoring the totality of the circumstances in this case. (Illinois v. Gates, supra, 462 U.S. at 230-232.)

II

IF THERE IS PROBABLE CAUSE TO BELIEVE THERE IS CONTRABAND IN A PARTICULAR CONTAINER WITHIN A VEHICLE, THEN A SEARCH WITHOUT A WARRANT IS PROPER

In the opening brief on the merits petitioner argued that the Court's cases established that two related policy considerations are involved in every vehicle search: the inherent mobility of a vehicle, and a lesser expectation of privacy that surrounds that vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. Both of these rationales fully apply in the case at bar. When Mr. Acevedo placed the bag in the car it attained the same degree of mobility as the car and was in an area subject to a lesser expectation of privacy. As such, given probable cause to believe that the car contained a bag and that bag contained illegal drugs, the officers could seize it

and search it without a warrant. The rules promulgated by the Court in Ross[3/] should fully cover the case at bar. No distinction should be made based on whether there was preexisting probable cause as to the container before it was placed into the vehicle.

Respondent's initial premise is that since the vehicle was immobilized any exigency had ended. This Court has already rejected that position. As the Court stated, "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." (Florida v. Meyers, 466 U.S. 382 (1984) (per curiam.) Relatedly, respondent then asserts that since a search warrant might have been readily obtained before the search, the search of the bag without a warrant was unjustified. Such a position

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3. United States v. Ross, 456 U.S. 798 (1982).

has been rejected by this Court. In California v. Carney, 471 U.S. 386, 404, fn. 16 (1985), an argument that a warrant was only minutes away was raised by Justice Stevens in his dissent but implicitly rejected by the majority. In United States v. Johns, supra, 469 U.S. at 478, 484, 486-487, this Court specifically rejected such a claim. In Johns a vehicle containing kilos of marijuana had been seized by DEA agents and taken to a warehouse. One of the attacks on the actions of the federal agents is that after the seizure and impound of the vehicle, the agents had ample opportunity to seek a warrant. This Court rejected such a claim, holding that a three day delay in conducting the search did not invalidate the officers' actions. (Id. at 487-488.)

Next, respondent questions the need for any bright line rule based on the

"plain and simple fact that no matter how bright a line is drawn, the police will follow it only when it is convenient for them." (Brief on the Merits, Argument II-B.) Respondent's assumption of fact cannot be accepted. This Court has stated that bright lines serve both the police and the public. (New York v. Belton, 453 U.S. 454, 459 (1981).) Police officers must know the limits of their authority before they encounter a vehicle in order to confidently and lawfully perform their sworn duties. Citizens have a right to know the limits of the officers' authority so they may know not only the scope of their protection but also what to expect and how to conform their conduct accordingly. (Id.) Workable bright line rules give practical meaning to the Constitutional guarantee of no unreasonable searches and seizures.

Respondent's argument that he had an even higher expectation of privacy in the contents of the bag because he placed it into the closed trunk rather than the passenger compartment of the vehicle is over simplified and thus misleading. As this Court has recognized, a privacy claim has two components: (1) a subjective belief on the part of the citizen; (2) which must be objectively reasonable. (Smith v. Maryland, 442 U.S. 735, 740 (1979), citing Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 351, 354, 356 (1967).) Respondent's entire discussion focuses on his claims as to what his subjective privacy expectations must have been.[4/]

Unfortunately for respondent, this Court has held that such subjective

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4. Of course, since Mr. Acevedo never testified at the motion to suppress evidence, the entire argument is based upon speculation by appellate counsel.

expectations do not survive when officers have probable cause to believe there is contraband in a vehicle.

> "In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." (United States v. Ross, supra, 456 U.S. at 823, accord United States v. Johns, supra, 469 U.S. at 484.)

Since the police had probable cause to believe that there was contraband in the bag in the vehicle, respondent's supposed subjective expectation of privacy did not survive.

Moreover, this Court has held that any subjective expectation of privacy respondent may have had is not objectively reasonable. "The public is fully aware that it is accorded less privacy in its automobiles." (California v. Carney,

supra, 471 U.S. at 392; accord New York v. Class, 475 U.S. 106, 113 (1986).)

Moreover, because of these pervasive governmental regulations, individuals have always been on notice that a movable vehicle may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts. (United States v. Ross, supra, 456 U.S. at 806, fn. 8.) Thus, respondent's volitional act of placing the bag of contraband into the vehicle subjected it to a lesser expectation of privacy. Any greater subjective expectation of privacy on Mr. Acevedo's part was not objectively reasonable. Moreover, since the police had probable cause to believe that there was contraband in the bag in the vehicle, even this lesser, objectively reasonable

expectation of privacy did not survive at all.[5]

Respondent's claim that in Carroll v. United States, supra, 267 U.S. 132, the officers could tell what was inside the seats of the car just by touching the seat covers is simply not supported by any facts set forth in that opinion. Indeed, the dissent sets forth the full testimony of the arresting officer. All he stated was that when he "struck at the lazyback of the seat it was hard." (Id., at 172.) The officer went on to state that it was only after he pulled the items out of the seat that "he found out it was liquor." (Id.) Thus, there is not one scintilla of evidence to support respondent's claim

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5. In this regard, respondent is in the same position as the defendant in Ross. Whatever subjective expectations of privacy Ross had as to the bag of drugs in the trunk of his car, it did not survive once the police had probable cause to believe there were drugs in his vehicle. The same principles apply to Mr. Acevedo's expectation.

that "the mere feeling of the upholstery disclosed the contents." (Respondent's Argument II-D, next to last paragraph.)

Respondent's claim that there is no need to allow for a search without a warrant because police officers can be trained to learn all of the intricacies of search and seizure law and thereby properly evaluate any and all possible applications, is somewhat far fetched.[6/] The court has already recognized that this troubled area is so complex that a,

> "single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in specific circumstances they confront." (Dunaway v. New York, 442 U.S. 200, 213-214 (1979).)

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6. Petitioner is hard pressed to understand the logic of respondent's argument that seems to be that increased police officer education affects the degree to which a warrant is or is not needed under the Fourth Amendment.

Indeed, the fact that after so many years of litigation appellate counsel can still debate the search issues involved in this case would seem conclusive proof that no amount of training could ever equip any officer to be able to fully and properly evaluate all possible search issues in the seconds available to officers in the field confronting rapidly changing situations. Illustrative of this problem is the statement made by the International Association of Chiefs of Police (IACP) in its amicus curiae brief in support of the petition for filed certiorari in Oklahoma v. Castleberry, 471 U.S. 146 (1985). The IACP, the largest organization of police executives and line officers in the world, noted that it was,

> "involved in police training programs at the national level and can attest to the fact that teaching the Ross container distinction to police officers is a near impossibility." (Brief of Amicus Curiae, Page 6, in Case 83-2126.)

Much of respondent's argument centers on the premise that because he can enunciate a statement that reconciles the holdings in Chadwick, Sanders and Ross, this constitutes a workable bright line rule for police officers. The assertion misses the point. The issue is not how well an appellate attorney, given the luxury of time and research, can state a particular rule. The issue is how easily that rule can be applied by officers in the field who have to make instantaneous decisions based upon rapidly developing situations. As pointed out by petitioner in its opening brief on the merits, the current rule forces police officers to make incredibly subtle factual and legal determinations of when the probable cause came into existence and whether the probable cause is particularized or unparticularized. While such a standard may be capable of verbal capsulation in an

appellate brief, it is still not a rule capable of rational application in the field. That the major police agencies in this country would find that teaching the Ross container distinction a near impossibility, is hardly surprising.

Finally, respondent's claim that a search of a car should be governed by the same rules as for a search of a house, has also been rejected by this Court. (Carroll v. United States, supra, 267 U.S. at 153.)[7] Indeed, as the Court noted in Carroll, the first United States Congress, the very Congress that drafted the Fourth Amendment and circulated it to the states for ratification, also passed statutes

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7. Indeed, at times it is difficult to differentiate whether respondent is attacking petitioner's proposed application of the Ross holding or the Court's ruling in Ross itself. To the extent that respondent attempts the latter argument, it is improper as it was never presented to this Court in the petition for certiorari or in a cross petition.

allowing for warrantless searches of contraband goods on movable vessels based on probable cause. (Carroll v. United States, supra, 267 U.S. at 153; citing 1 Stat. 29, 43.) Thus, "practically since the beginning of the Government," there has been recognized,

> "a necessary difference between the search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods. . . ." (Carroll v. United States, supra, 267 U.S. at 153.)

Thus, treating a vehicle containing contraband differently than a house containing contraband is a concept that dates from the very formative days of this nation.

Therefore, if there is probable cause to believe there is contraband in a vehicle, or probable cause to believe that there is contraband in a particular container within a vehicle, then a search

without a warrant is proper. The two controlling principles the Court has identified as being involved in every vehicle search were fully present for the search of Mr. Acevedo's vehicle: the mobility of the vehicle and its contents and the diminished expectation of privacy surrounding a vehicle. The mere fact that the probable cause centered only on one closed container before it went into the car does not diminish the scope and effect of either of these key variables.

The Court should hold that the principles it set forth in Ross and Carney govern the search of the car in the case at bar and no search warrant was required. Such a bright line rule will give needed guidance to police officers in the performance of their law enforcement functions and at the same time protect individual rights.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal, Fourth Appellate District, Division Three, should be reversed.

DATED: December 18, 1990.

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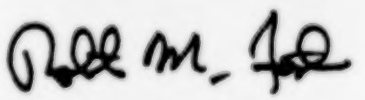

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No: 89-1690
October Term, 1990

STATE OF CALIFORNIA

Petitioner,

v.

CHARLES STEVEN ACEVEDO

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Santa Ana, CA 92705

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925 No. Spurgeon
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 19th day of December, 1990.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 19, 1990.

Rob Dunham
ROBIN DUNHAM

Subscribed and sworn to before me
this 8th day of December 19, 1990.

REGINA C. KAMHOLZ
Notary Public—California
County of San Diego
My Commission Expires 11/19/93

Regina C. Kamholz
Notary Public in and for said County and State